Supreme Court, U
DEC 5 19
ODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
Respondent,

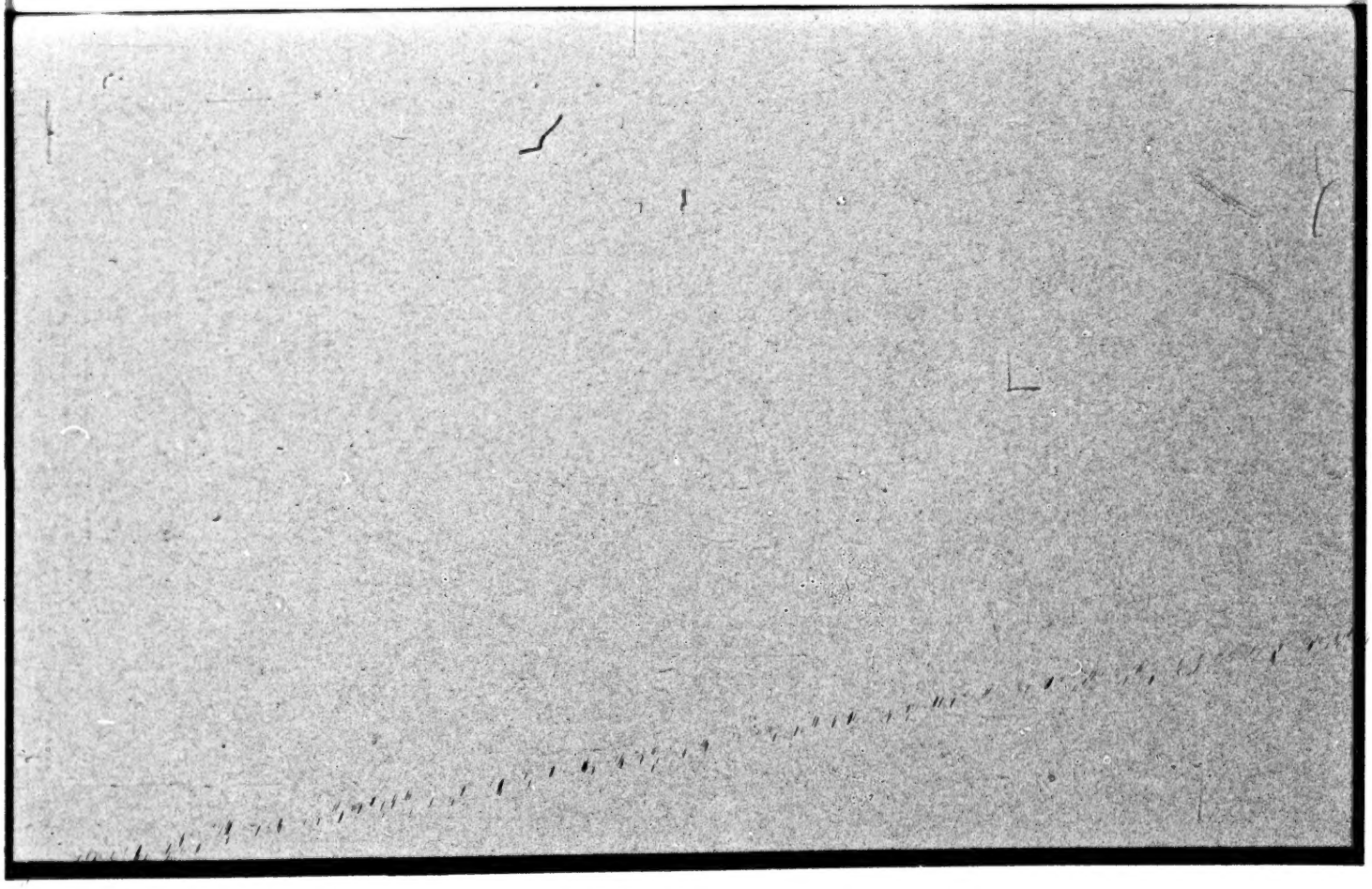
and

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

PETITION FOR CERTIORARI—FILED JULY 20, 1974
CERTIORARI GRANTED—OCTOBER 21, 1974



INDEX

	PAGE
List of Relevant Docket Entries	ii
Complaint of the Securities and Exchange Commission, Filed December 22, 1970	1
Application for Appointment of Receiver, Filed January 21, 1971	18
Receiver's Petition No. 22 for an Order to Show Cause, Filed March 31, 1972	19
Order No. 49 Requiring SEC and SIPC to Show Cause, Entered April 6, 1972	28
Answer to Petition No. 22 of Respondent Securities Investor Protection Corporation, Filed May 17, 1972	29
Response of Securities and Exchange Commission to Receiver's Petition No. 22, Filed May 17, 1972	62
Memorandum No. 54, Entered January 10, 1973	72
Order No. 55, Entered February 8, 1973	79
Opinion of Court of Appeals, Filed April 23, 1974	80
Judgment of Court of Appeals, Filed April 23, 1974	90
Order of the Supreme Court, Filed October 21, 1974	92

LIST OF RELEVANT DOCKET ENTRIES

December 22, 1970	—Filed complaint of Securities and Exchange Commission.
January 6, 1971	—Filed Findings of Fact and Conclusions of Law—Morton, J.
January 21, 1971	—Filed application by Securities and Exchange Commission for appointment of receiver.
January 29, 1971	—Entered agreed order appointing receiver, Morton, J.
February 9, 1971	—Entered memorandum of court re appointment of receiver, Morton, J.
March 31, 1972	—Filed receiver's petition no. 22 for a show cause order.
April 6, 1972	—Entered order no. 49 that Securities and Exchange Commission and Securities Investor Protection Corporation show cause why Securities Investor Protection Act not available.
April 19, 1972	—Entered order no. 50 adjourning return date on show cause order.
May 17, 1972	—Filed answer of Securities Investor Protection Corporation (exhibits).
May 17, 1972	—Filed response of Securities and Exchange Commission (exhibits).
June 7, 1972	—Before Morton, J., hearing on order to show cause.
January 10, 1973	—Entered memorandum no. 54 dismissing Securities Investor Protection Corporation as a party—Morton, J.
February 6, 1973	—Filed receiver's motion to amend memorandum no. 54.
February 8, 1973	—Entered order no. 55 stating that memorandum no. 54 constituted the entry of a final judgment as to Securities Investor Protection Corporation.
February 9, 1973	—Filed notice of appeal by receiver.
April 23, 1974	—Filed opinion and judgment of the Court of Appeals reversing the District Court's order as to Securities Investor Protection Corporation.
July 20, 1974	—Filed petition for writ of certiorari by Securities Investor Protection Corporation with the Supreme Court of the United States.
October 21, 1974	—Filed order of Supreme Court granting petition for writ of certiorari.

SEC Complaint

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION

vs.

GUARANTY BOND AND SECURITIES CORPORATION, et al.

(Filed December 22, 1970)

1. It appears to the plaintiff that the defendants are engaged and are about to engage in acts and practices which constitute and will constitute violations of Sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 (Exchange Act) [15 U.S.C. 78o(b), 78o(b)(10), 78o(c)(1), 78o(c)(3) and 78q(a)], Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 (Securities Act) [15 U.S.C. 77q(a)(2) and 77q(a)(3)] and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 [17 CFR 240.10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3] which rules were promulgated and prescribed by the plaintiff pursuant to the Exchange Act, were in effect at all times herein alleged and are now in effect. Plaintiff, pursuant to Section 21(e) of the Exchange Act [15 U.S.C.

78u(e)] and Section 20(b) of the Securities Act [15 U.S.C. 77t(b)] brings this action to enjoin such acts and practices.

2. This Court has jurisdiction of this action under Section 27 of the Exchange Act [15 USC 78aa) and Section 22(a) of the Securities Act [15 U.S.C. 77v(a)].

3. Defendant Guaranty Bond and Securities Corporation (hereinafter sometimes referred to as "registrant") is a corporation organized under the laws of Tennessee on April 16, 1962, and has its principal place of business at 2312 West End Avenue, Nashville, Tennessee. Since June 20, 1962, registrant has been and is now registered as a broker and dealer in securities pursuant to Section 15(b) of the Exchange Act [15 U.S.C. 78o(b)]. Defendant Henry Jeremiah Huey, Jr., hereinafter sometimes referred to as "H. J. Huey", is President and a director of registrant, and resides at 132 Carnavon Parkway, Nashville, Tennessee. Defendant Brooks Thomas Huey (hereinafter sometimes referred to as "B. T. Huey") is Secretary, Treasurer and a director of registrant, and resides at 6668 Jocelyn Hollow Road, Nashville, Tennessee. Defendant Guaranty Bond Company, Inc. (hereinafter sometimes referred to as "parent") is a corporation organized under the laws of Tennessee, has its principal place of business at 2312 West End Avenue, Nashville, Tennessee, and owns all of the outstanding stock of registrant. Parent is owned principally by a partnership composed of H. J. Huey and B. T. Huey.

Count One

4. During the period from approximately March 31, 1970, to the date hereof, registrant as a broker and dealer in securities, aided and abetted by the other defendants,

has made and is making use of the mails and of means and instrumentalities of interstate commerce to effect transactions in and induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange while and at times when the net capital of registrant was and is less than $5,000 and its aggregate indebtedness to all other persons exceeded and exceeds two thousand (2,000) per centum of its net capital in contravention of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1].

Count Two

5. During the period from about May 1, 1969, to the date hereof, registrant, as a securities broker and dealer registered pursuant to Section 15(b) of the Exchange Act [15 U.S.C. 78o(b)], aided and abetted by the other defendants, has failed and is failing to make and keep current books and other records relating to its business in contravention of Section 17(a) of the Exchange Act [15 U.S.C. 78q(a)] and Rule 17a-3 [17 CFR 240.17a-3], in that it did not maintain a position record for all securities long and short and their locations; it did not maintain ledger accounts for customers itemizing purchases, sales, receipts and deliveries of securities for such accounts or correctly and accurately reflect the condition of such accounts; its inventory of securities was inaccurate; its income account failed to reflect all income received; its net capital computations were incorrect; and it did not have personnel questionnaires for certain associated persons.

Count Three

6. During the period from approximately May 1, 1969, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, has made and is making use of the mails and means and instruments of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, practices and courses of business as specified in paragraphs numbered 7 and 8 hereof, in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rules 15c1-4 [17 CFR 240.15c1-4] and 15c1-6 [17 CFR 240.15c1-6].

7. Registrant, aided and abetted by the other defendants, has effected and is effecting with or for the accounts of customers transactions in, and has induced and is inducing the purchase and sale by customers of, securities (other than U. S. Tax Savings Notes, U. S. Defense Savings Stamps or U. S. Defense Savings Bonds, Series E, F and G) without at or before the completion of each such transaction giving or sending to such customers written notification disclosing: (a) whether registrant was acting as a broker for such customers, as a dealer for its own account, as a broker for some other person, or as a broker for both such customers and some other person; and (b) in cases where registrant was acting as a broker for such customers or as a broker for both such customers and some other person, either the name of the person from whom the security was purchased or to whom it was sold for such customer and the date and time when such transaction took place or the

fact that such information would be furnished upon the request of such customers, and the source and amount of any commission or other remuneration received or to be received by registrant in connection with the transaction as provided in Rule 15c1-4 [17 CFR 240.15c1-4].

8. Registrant, aided and abetted by the other defendants, as a securities broker acting for customers and for customers and other persons, has engaged and is engaging in acts designed to effect with or for the accounts of such customers, transactions in and purchases and sales by such customers of securities in the primary or secondary distributions of which registrant was and is participating and was and is financially interested without, at or before the completion of each such transaction, giving or sending to such customers written notification of the existence of such participation or interest as prescribed in Rule 15c1-6 [17 CFR 15c1-6].

Count Four

9. During the period from approximately May 1, 1969, to the date hereof, registrant, as a securities broker and dealer not a member of a national securities association, aided and abetted by the other defendants, has effected and is effecting securities transactions in contravention of Section 15(b)(10) of the Exchange Act [15 U.S.C. 78o(b)(10)] and Rule 15b10-5 [17 CFR 240.15b10-5], in that registrant exercised and is exercising discretionary power or authority for customers without such customers having given their prior written authorization to exercise such power or authority to a stated associated person or persons, and having indicated their reasons for giving such authorizations.

Count Five

10. During the period from approximately May 1, 1966, to the date hereof, registrant has been and is a securities broker and dealer engaged in the business of effecting transactions for the accounts of others and for its own account and, as such, aided and abetted by the other defendants, has made and is making use of the mails and of means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, including the acts, practices and courses of business specified in paragraphs numbered 6 through 14 hereof, in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rule 15c1-2 [17 CFR 240.15c1-2].

11. Defendants solicited and are soliciting churches and other religious institutions to employ registrant as underwriter for the public offering of their bonds under a program in which registrant guaranteed and guarantees the sale of all the bonds on the representation that registrant was and is able to make such firm commitments for the purchase and/or sale of such securities, was and is able to meet all obligations and liabilities arising in connection therewith and was and is operating within the jurisdiction of the federal and state authorties charged with regulating the securities industry, when in fact registrant was and is unable to meet the net capital requirements of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1], registrant's report on Form 17A-5 as of March 31, 1970, filed with the Commis-

sion, was misleading in that it failed to accurately reflect registrant's assets and liabilities and indicated that registrant had sufficient net capital to meet the requirements of said Rule, registrant omitted and is omitting to disclose to, and concealed and is concealing from, issuers for which it acted and is acting as underwriter its financial condition and its inability to meet the financial responsibility requirements of Rule 15c3-1 [17 CFR 240.15c3-1] and its failure to comply with applicable federal laws and regulations relating to the securities industry as alleged in paragraphs numbered 4 through 16 hereof.

12. Defendants have induced and are inducing churches and other religious institutions (hereinafter sometimes referred to as "borrowers") to execute underwriting agreements of Rule 15c3-1 [17 CFR 240.15c3-1] and its failure their bonds and custodian of funds received from sales thereof and which contain a provision that registrant may invest such funds in religious institutional bonds for such borrowers, as necessary, liquidate such investments, make disbursements and deliver funds for payment of such borrowers' obligations incurred in their construction and other programs, and return to such borrowers 5% simple interest earned on such funds. On the basis of this general authority defendants have exercised and are exercising discretionary authority over funds received from sales of bonds issued by such borrowers and over such borrowers' accounts with registrant, effecting transactions therewith and therein, including sales to such borrowers of bonds issued by other churches and religious institutions having maturities of from one to fourteen years, without sending to such borrowers confirmations advising them of the securities sold to them and placed in their accounts, the date

and amount of each such transaction and the source and amount of commission and other remuneration received or to be received by defendants in connection with each such transaction. Registrant has credited and is crediting to the accounts of such borrowers only 5% simple interest on the amounts invested for such borrowers in the bonds of other churches and religious institutions even though the interest rates on the bonds placed in such borrowers' accounts have been and are considerably greater and defendants have retained and treated and are retaining and treating as income to registrant the interest differential between the 5% rate paid to such borrowers and the substantially higher yields on the bonds placed in their accounts, thus obtaining secret profits from such borrowers while acting in the capacity of their agent, custodian and fiduciary. Registrant has been and is, in some instances, investing funds held as custodian for a particular religious institution in such institution's own bonds with the result that the institution pays interest on such bonds at a rate in excess of 5% per annum but receives a credit to its account with registrant of only 5% per annum, registrant retaining the interest differential as a secret profit.

13. During the period from about May 1, 1966, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, solicited and is soliciting churches and other religious institutions to employ registrant as underwriter of their bonds and has solicited and is soliciting investors to purchase such bonds, on the representations that the sale of all bonds so underwritten by registrant is guaranteed by it and that registrant will purchase or sell any bonds remaining after the church has put forth its best effort, without disclosing that registrant had placed and is placing a substantial portion

of such bonds in the accounts of other churches and religious institutional issuers for which it was and is acting as underwriter and for which it is holding funds as custodian by recording buy and sell transactions in securities on registrant's books between various of such religious institutions; that availability of funds for a particular issuer's construction or other program could be dependent upon registrant's ability to dispose of securities in which such funds were thus invested; that there is no independent market for such securities; and that issuers whose funds are invested by registrant in securities of other institutions may bear the risk of loss resulting from default or failure of an issuer of a security in which their funds are invested.

14. During the period from about May 1, 1966, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, offered and is offering to sell and sold and is selling religious institutional bonds through the use of prospectuses prepared by registrant which are materially false and misleading in that each contained the representation that the proceeds from the sales of the religious institutional bonds described therein shall be disbursed by registrant in accordance with the purposes of the bond issue as set out in the particular prospectus—i.e. for such expenditures as consolidation and retirement of existing indebtedness, purchase of land for new buildings, and construction, expansion and remodeling of churches, sanctuaries, educational buildings and other facilities—without disclosing: That such proceeds would be turned over to registrant as custodian; that registrant in its discretion would invest them in other religious institution bonds having extended maturites of from one to fourteen years; the amounts of such proceeds to be paid to

registrant and the other defendants as fees, commissions and other remunerations; and the use by registrant of such proceeds in completing other underwritings in which it and the other defendants would receive substantial fees, commissions and other remunerations.

Count Six

15. During the period from about May 1, 1966, to the date hereof, registrant, as a securities broker and dealer, aided and abetted by the other defendants, by use of means and instrumentalities of interstate commerce and of the mails, directly and indirectly, used and employed and is using and employing manipulative and deceptive devices and contrivances in contravention of Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b-5], in that registrant was and is:

(a) Engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon customers of registrant as described more particularly in paragraphs 11 through 14 of Count Five hereof;

(b) Making untrue statements of material facts, namely, the statements set forth in paragraphs 11 through 14 of Count Five hereof; and

(c) Omitting to state the facts specified in paragraphs 11 through 14 of Count Five hereof relating to registrant's financial condition, its lack of sufficient capital to meet the requirements of the federal laws and rules relating to financial responsibilities of securities brokers and dealers, its mode of operations, its secret profits from transactions in discretionary accounts, and details of transac-

tions in which funds and securities were transferred between accounts of customers on the books of registrant, which facts were material in order to make the statement made, in the light of the circumstances under which they were made, not misleading.

Count Seven

16. During the period from about May 1, 1966, to the date hereof, in contravention of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 [15 U.S.C. 77q(a)(2) and (3)], registrant, as a securities broker and dealer, aided and abetted by the other defendants, in offers and sales of securities by use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly:

(a) Obtained money and property by means of the untrue statements of material facts as set forth in paragraphs 11 through 14 of Count Five hereof;

(b) Obtained money and property by means of the omissions to state material facts as set forth in paragraphs 11 through 14 of Count Five hereof, which facts were necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

(c) Engaged in the transactions, practices and courses of business described in paragraphs 11 through 14 of Count Five hereof, which operated and would operate as a fraud and deceit upon the purchasers of such securities.

17. Defendants will unless restrained and enjoined continue to engage in the acts and practices set forth in this complaint.

Wherefore, the plaintiff demands:

A. A preliminary injunction and a final judgment enjoining defendant Guaranty Bond and Securities Corporation, its officers, agents, servants, employees and attorneys, and each of them, from, and defendants Henry Jeremiah Huey, Jr., Brooks Thomas Huey and Guaranty Bond Co., Inc., their officers, agents, servants, employees and attorneys, and each of them, from aiding and abetting defendant Guaranty Bond and Securities Corporation in:

(1) Making use of the mails or any means or instrumentality of interstate commerce to effect transactions in or to induce the purchase or sale of securities (other than an exempted security, or commercial paper, bankers' acceptances or commercial bills) otherwise than on a national securities exchange, while and at a time when the net capital of registrant is less than $5,000 and its aggregate indebtedness to all other persons exceeds two thousand (2,000) per centum of its net capital in contravention of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17CFR 240.15c3-1] thereunder.

(2) Failing to make and keep current books and records of registrant relating to its business as a securities broker and dealer registered pursuant to Section 15 of the Exchange Act [15 U.S.C. 78o] in contravention of Section 17(a) of the Exchange Act [15 U.S.C. 78q(a)] and Rule 17a-3 [17 CFR 240.17a-3] thereunder.

(3) Making use of the mails and means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange by:

(a) Effecting with or for the accounts of customers transactions in and inducing the purchase or sale by customers of securities (other than U.S. Treasury Savings Notes, U.S. Defense Savings Stamps or U.S. Defense Savings Bonds, Series E, F and G), without registrant at or before the completion of each such transaction giving or sending to the customer a written notification disclosing the information prescribed in Rule 15c1-4 [17 CFR 240.15c1-4] in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)];

(b) Engaging in acts designed to effect with or for the accounts of customers for whom registrant is acting, any transaction in, or purchase or sale of, a security in the primary or secondary distribution of which registrant is participating, or is otherwise financially interested, without registrant at or before the completion of each such transaction giving or sending to the customer written notification of the existence of such participation or interest as prescribed in Rule 15c1-6 [17 CFR 15c1-6] in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)].

(4) Effecting transactions in, or inducing the purchase or sale of, any security (otherwise than on a national securities exchange) in which registrant, while a nonmember broker or dealer, shall exercise any discretionary power or authority for any customer unless such customer has given prior written authorization to exercise such power and authority to a stated associated person or persons and has indicated the reasons for such authorization as provided in Rule 15b10-5 [17 CFR 15b10-5] in contravention of Section 15(b)(10) of the Exchange Act [15 U.S.C. 78o(b)(10)].

(5) Making use of the mails or of any means or instrumentalities of interstate commerce while registrant is a securities broker or dealer engaged in the business of effecting transactions in securities for the accounts of others or for its own account, to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive or other fraudulent device or contrivance in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(6)] and Rule 15c1-2 [17 CFR 240.15c1-2] thereunder, including

(a) Any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with:

(i) the solicitation or acceptance of underwriting agreements for the purchase and/or sale of securities while registrant

is unable to meet the requirements of the net capital rule, Rule 15c3-1 [17 CFR 240.15c3-1];

(ii) the exercise of discretionary authority over the accounts of customers for the purchase and/or sale of securities;

(iii) the use of monies paid by customers for the purchase of securities or the use of funds received as proceeds from the sale of securities by issuers;

(iv) registrant's use of funds held as custodian from sales of securities for which it is acting as underwriter.

(b) Any untrue statement of a material fact or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading concerning:

(i) the financial condition of registrant;

(ii) registrant's compliance with the requirements of federal and state laws and rules applicable to the securities industry;

(iii) service charges, fees, commissions and interest differentials received by registrant and its parent;

(iv) the use of monies paid by customers for the purchase of securities;

(v) investments of monies received from or through the sale of securities; or

(vi) benefits to registrant and/or its parent from the exercise of discretionary authority over the accounts of customers.

(6) Directly or indirectly, by use of any means or any instrumentality of interstate commerce or of the mails, to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10 b-5], more particularly:

(a) Engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the matters described in paragraphs (a)(i) through (iv) of Demand A(5) hereof, or engaging in any other act, practice or course of business of similar purport or object which operates or would operate as a fraud or deceit upon any person:

(b) Making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading concerning the matters described in paragraphs (b)(i) through (b)(vi) of Demand A(5) hereof, or making any other untrue statement of a material fact or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading similar to those specifically referred to herein above or of similar purport or object.

(7) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails, in the offer or sale of any security, directly or indirectly:

(a) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading concerning the matters specified in paragraphs (b)(i) through (b)(v), inclusive, of Demand A(5), hereof, or any other untrue statement or omission of similar purport or object;

(b) To engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon any purchaser in connection with the matters described in paragraphs (a)(i) through (a)(iv), inclusive, of Demand A(5) hereof, or to engage in any other transaction, practice or course of business of similar purport or object which operates or would operate as a fraud or deceit upon the purchaser.

B. Such other and further relief as the nature of the case may require and as this Court may deem proper.

JULE B. GREENE
J. CECIL PENLAND
JENNIE H. RANDOLPH
JOHN M. KELLY
Attorneys for the Securities and
Exchange Commission
Suite 138, 1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

Application for Appointment of Receiver

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[CAPTION OMITTED]

(Filed January 21, 1971)

Plaintiff applies to the Court for an order appointing a receiver for defendant Guaranty Bond and Securities Corporation (registrant) and all funds, securities and other assets and property of, belonging to, or in possession of it and authorizing, empowering and directing such receiver to collect, take possession of and take charge of all and singular thereof, to hold the same subject to the further order of the Court, to obtain an accounting of all funds and securities entrusted by customers and other persons to registrant and with the usual powers of receivers.

As grounds therefor plaintiff states that receivership of registrant is apparently the only remedy that will adequately protect the interests of the churches and other religious institutions for which registrant has been acting as underwriter and the interests of the other customers and creditors of registrant.

JULE B. GREENE
J. CECIL PENLAND
JENNIE H. RANDOLPH
Attorneys for Securities and
Exchange Commission
Suite 140
1371 Peachtree Street N.E.
Atlanta, Georgia 30309

Receiver's Petition No. 22

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[CAPTION OMITTED]

(Filed March 31, 1972)

Petitioner, James C. Barbour, Receiver, would respectfully show to the Court that:

1. Shortly after his appointment, he was advised by a representative of the Atlanta Regional Office of plaintiff, Securities and Exchange Commission, that customers of Guaranty Bond and Securities Corporation might be entitled to protection under the provisions of the Securities Investor Protection Act of 1970 (15 USCA ¶¶78 aaa, et seq.).

2. On or about May 5, 1971, plaintiff's representative mentioned the matter to petitioner again and stated that the Atlanta Regional Office had transmitted to its Washington Office the required notice under the statute but that it might have been delayed in reaching the Securities Investors Protection Corporation (hereinafter referred to as SIPC).

3. Thereupon petitioner instructed his attorney to make inquiry of SIPC and to demand protection under the Act. A copy of the letter addressed to Honorable Byron D. Woodside, Chairman, with copy to Mr. Jule B. Greene and

Mr. J. Cecil Penland, Securities and Exchange Commission in Atlanta, Georgia is made Exhibit No. 1 hereto.

4. During the next several months the Receiver and his attorney supplied voluminous information and a long list of documents requested by the corporation, including an opinion of petitioner's attorney with respect to application of the Act to the instant proceeding. A copy of the letter to Mr. Theodore Focht, General Counsel of SIPC dated June 24, 1971 is made Exhibit No. 2 hereto.

5. By letter dated October 5, 1971, the General Counsel indicated that while SIPC required certain additional information, "based on the information presently available, this corporation has no plans for filing an application for the appointment of a trustee in this proceeding."

6. On November 1, 1971, in response to an inquiry from petitioner's counsel as to the basis for this determination the General Counsel advised that it involved "the question of retroactive application of the statute and the question of the ability of a SIPC trustee to carry out the purposes of the 1970 Act at this point in the liquidation of this company."

7. On November 24, 1971, the Chairman of SIPC advised that the "protections provided by that Act are not unlimited, however, and we are of the present opinion that the limitations contained in the Act make it necessary for this Corporation to decline to intervene in the Guaranty Bond and Securities case."

8. Petitioner's counsel then wrote to plaintiff's Regional Office in Atlanta in an effort to determine the date upon which it had advised its Washington Office of the possible application of the Act to Guaranty Bond and Securities

Corporation but the letter was forwarded to the Washington Office for reply and petitioner has been unable to obtain any information as to whether or not and on what date notice was given by plaintiff to SIPC as required by the statute.

9. Petitioner is advised and believes that the customers of Guaranty Bond and Securities Corporation are entitled to the protection of the Act. Guaranty Bond and Securities Corporation was a registered broker dealer when the Act took effect on December 30, 1970 and engaged in the investment and securities business until at least January 6, 1971 when a temporary injunction was entered herein at the request of plaintiff.

10. Plaintiff had a statutory duty under § 5(a)(1) of the Act to notify SIPC that Guaranty Bond and Securities Corporation was in or was approaching financial difficulty on or about December 30, 1970 when the Act took effect since it had already filed the Complaint in the instant action on December 22, 1970 alleging among other things that the broker dealer was in violation of net capital requirements established under SEC regulations.

11. If so notified, SIPC had an opportunity to intervene in the present proceeding before the injunction was issued and before the appointment of a Receiver. Even after the appointment of petitioner as Receiver, SIPC had the opportunity to intervene and seek the appointment of a Trustee under the Act as it has done in other proceedings, including one action pending in this Court.

12. If SIPC was not notified of the financial difficulties of Guaranty Bond and Securities Corporation, it was because of the failure of plaintiff to discharge its statutory

duty and not because of any neglect on the part of petitioner.

13. While the Receiver has done everything within his power to protect the interests of the customers of Guaranty Bond and Securities Corporation, including the return of their bonds and excess credit balances, it appears that such customers will sustain a loss at least equal to that portion of the 5% reserve fund established under Order No. 22 herein which may be required in order to defray part of the costs, fees and expenses of this receivership.

14. SIPC is subject to the jurisdiction of this Court because it is engaged in business in the Middle District of Tennessee in that it collects assessments under the Act from broker dealers operating in the District.

Wherefore, Premises Considered, Petitioner Prays:

1. That a copy of this Petition be served upon plaintiff and SIPC and that an Order be entered requiring respondents to show cause on or before a day certain why SIPC should not be required to intervene herein and afford to the customers of Guaranty Bond and Securities Corporation the benefits of the Act.

2. For general relief.

JAMES C. BARBOUR
Receiver

W. OVID COLLINS, JR.
Attorney for the Receiver

Receiver's Petition No. 22

State of Tennessee }
County of Davidson }

James C. Barbour, being first duly sworn, makes oath that the statements contained in his foregoing Petition are true to the best of his knowledge, information and belief.

JAMES C. BARBOUR

Sworn to and subscribed before me this 30th day of March, 1972.

PATRICIA R. SILLS
Notary Public

My Commission Expires: November 24, 1974

Receiver's Petition No. 22

EXHIBIT NO. 1

May 27, 1971

Honorable Byron D. Woodside, Chairman
Securities Investors Protection Commission
500 North Capitol Street
Washington, D. C. 20549

Re: Guaranty Bond and Securities Corporation

Dear Sir:

The undersigned is attorney for James C. Barbour, Receiver for the above named registered dealer pursuant to appointment on January 29, 1971 by the United States District Court for the Middle District of Tennessee, Nashville Division, in the cause styled Securities and Exchange Commission v. Guaranty Bond and Securities Corporation, et al., Civil Action No. 5989.

It appears that the registrant qualifies as a member of the Securities Investor Protection Corporation under Section 3(a) (2) (A) of the Securities Investor Protection Act of 1970. While the District Court proceeding was filed without reference to the Act, there has been a finding of insolvency by the District Judge and the cause has pursued a course very similar to that contemplated by the Act, including the distribution of identifiable securities to their owners.

It further appears, however, that investors will lose some portion of their net equities in money credit balances and this letter is to make application to the Commission for assistance and such advances to the Receiver as may be required to satisfy the claims of each customer within the limitations of the Act.

We will, of course, be happy to supply such additional information as you may request and we will appreciate your acknowledging receipt of this letter as a claim on behalf of the Receiver.

Yours very truly

W. Ovid Collins, Jr.

WOC:kc

cc: Mr. James C. Barbour, Receiver
Guaranty Bond and Securities Corporation
2312 West End Avenue
Nashville, Tennessee 37203

Mr. Jule B. Greene
Mr. J. Cecil Penland
Securities and Exchange Commission
Suite 138
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

Receiver's Petition No. 22

EXHIBIT NO. 2

June 24, 1971

Mr. Theodore Focht
Securities Investor Protection Corporation
Suite 104 Astral Building
955 North L'Enfant Plaza, S.W.
Washington, D. C. 20024

Re: Guaranty Bond and Securities Corporation
Civil Action No. 5989

Dear Mr. Focht:

In accordance with your telephone conversation on June 21, 1971 with Mr. James C. Barbour, Receiver for Guaranty Bond and Securities Corporation, I am writing this letter as a statement of facts which in my opinion justifies the conclusion that the Securities Investor Protection Act of 1970 is applicable to the above proceeding.

Guaranty Bond and Securities Corporation is a registered broker-dealer and therefore automatically a member of the Securities Investor Protection Corporation.

It has been declared insolvent and is in receivership in the United States District Court for the Middle District of Tennessee, Nashville Division.

While all securities on hand have been delivered or tendered to the registrant's investors and customers, they were required to deposit 5% of the face amount of the securities in a reserve fund, some part of which will necessarily be utilized for the payment of the costs of the receivership since the assets of the insolvent corporation are not sufficient.

It thus appears that the investors and customers will lose a portion of their equity in cash and it is my under-

standing of the Act that it is designed to protect them against such a loss. The Receiver can be designated as Trustee and given the powers, duties and responsibilities set forth in the Act. If the necessary funds are advanced to the Trustee, reimbursement may be made to the investors and customers at this time of the 5% deposit made by each and at the conclusion of the receivership proceeding, the Securities Investor Protection Corporation will be reimbursed by that portion of the reserve fund remaining unexpended.

I trust that the foregoing is in compliance with your request but if further information or statements are required, lease advise.

Yours very truly

W. Ovid Collins, Jr.

WOC:kc
cc: Mr. James C. Barbour, Receiver

Order No. 49

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION

vs.

GUARANTY BOND AND SECURITIES CORPORATION, et al.

(Entered April 6, 1972)

This cause came on to be heard under the Receiver's Petition No. 22 alleging that the customers of Guaranty Bond and Securities Corporation are entitled to the protection and benefits afforded by the Securities Investor Protection Act of 1970 (15 USCA §§ 78aaa, et seq.) when, it appearing to the Court that the question as to the applicability of the Act should be adjudicated without undue delay.

It is Ordered that plaintiff, Securities and Exchange Commission, and the Securities Investors Protection Corporation be served with a copy of the Petition and that they show cause, if any they have, on or before the 20th day of April, 1972 at 9:00 o'clock A.M. why the remedies afforded by the Act should not be made available in this proceeding.

/s/ L. CLURE MORTON
United States District Judge

Approved for Entry:

W. OVID COLLINS, JR.
Attorney for the Receiver

Answer of the Securities Investor Protection Corporation

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[CAPTION OMITTED]

(Filed: May 17, 1972)

Respondent, Securities Investor Protection Corporation (hereinafter sometimes referred to as "SIPC"), for answer to Petition No. 22 herein, respectfully alleges and shows to the Court as follows:

1. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "1," "2," "8" and "13" of the petition herein.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the petition herein, except admits that it received the letter referred to therein, a copy of which is attached thereto as Exhibit No. 1.

3. Denies each and every allegation contained in paragraph "4" of the petition herein, except admits that it received certain information and papers from the petitioner or his attorney, and further admits that it received the letter referred to therein, a copy of which it attached thereto as Exhibit No. 2.

4. Answering the allegations contained in paragraph "5" of the petition herein, admits that its General Counsel sent a letter dated October 5, 1971 to the attorney for the petitioner herein, a copy of which is hereto annexed as Exhibit A, but otherwise denies each and every allegation contained in said paragraph "5."

5. Answering the allegations contained in paragraph "6" of the petition herein, admits that its General Counsel sent a letter dated November 1, 1971 to the attorney for the petitioner herein, a copy of which is hereto annexed as Exhibit B, but otherwise denies each and every allegation contained in said paragraph "6."

6. Answering the allegations contained in paragraph "7" of the petition herein, admits that its Chairman sent a letter dated November 24, 1971 to the Honorable William E. Brock, Jr., a copy of which is hereto annexed as Exhibit C, but otherwise denies each and every allegation contained in said paragraph "7."

7. Answering the allegations contained in paragraph "9" of the petition herein, admits that a temporary injunction against the defendants was entered herein at the plaintiff's request on or about January 6, 1971, but otherwise denies it has knowledge or information sufficient to form a belief with respect to the truth of the remaining allegations contained in said paragraph "9," including the petitioner's alleged advice and belief regarding the protection available to customers of Guaranty Bond and Securities Corporation (hereinafter referred to as "Guaranty Bond").

8. Admits each and every allegation contained in paragraph "10" of the petition herein, except alleges that

Guaranty Bond was in or was approaching financial difficulty on a date substantially prior to December 30, 1970.

9. Denies each and every allegation contained in paragraph "11" of the petition herein.

10. Admits each and every allegation contained in paragraph "12" of the petition herein, except denies that SIPC's lack of timely knowledge or notice of the financial difficulties of Guaranty Bond was not attributable to the neglect or other act or omission on the part of petitioner.

11. Denies each and every allegation contained in paragraph "14" of the petition herein, except admits that it receives payments upon assessments from certain broker-dealers doing business in the Middle District of Tennessee.

First Defense

12. The petition fails to state a claim against SIPC upon which relief can be granted.

Second Defense

13. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond was guilty of numerous substantial violations of the Securities Exchange Act of 1934 ("Exchange Act") and the Securities Act of 1933 ("Securities Act"), and rules promulgated thereunder, more particularly violations of sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Exchange Act, sections 17(a)(2) and 17(a)(3) of the Securities Act, and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 promulgated thereunder.

14. Upon information and belief, as a result of the violations aforesaid on or about December 22, 1970 the plaintiff herein commenced an action to enjoin Guaranty Bond from the commission of further violations, and to enjoin the other defendants herein from aiding or abetting Guaranty Bond in the commission thereof. On or about January 6, 1971 this Court granted a preliminary injunction as prayed for in the plaintiff's complaint.

15. Upon information and belief, in granting the aforesaid preliminary injunction this Court made and filed its Findings of Fact and Conclusions of Law, a copy of which is hereto annexed as Exhibit D, which Findings of Fact and Conclusions of Law are hereby incorporated herein by reference.

16. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond's violation of Section 15(c)(3) of the Exchange Act, and Rule 15c3-1 promulgated thereunder, was substantial and impossible of correction by Guaranty Bond, and its capital deficiency exceeded three million dollars.

17. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond was in or was approaching serious financial difficulty, and had failed or was in danger of failing to meet its obligations to its customers.

18. By reason of the foregoing, the Securities Investor Protection Act of 1970 (84 Stat. 1636; Public Law 91-598, 91st Congress, H. R. 19333) (hereinafter referred to as the "1970 Act") does not apply to Guaranty Bond, and the remedies and benefits provided therein may not be invoked by, or for the benefit of, its customers or any other person.

Answer of the
Securities Investor Protection Corporation

Third Defense

19. Repeats and realleges each and every allegation hereinabove contained in paragraph "14."

20. Upon information and belief, on January 27, 1971 this Court made an order appointing the petitioner as receiver for Guaranty Bond and its parent, Guaranty Bond Co., Inc. (hereinafter referred to as "Guaranty Bond's Parent"), and conferring upon said receiver the powers, authority, rights and obligations therein contained. In that order the court found, in part, that receivership was the only remedy that would adequately protect the interests of churches and other religious institutions for which Guaranty Bond had been acting as underwriter, and the interests of other customers and creditors of both corporations. A copy of that order is hereto annexed as Exhibit E and incorporated herein by reference.

21. Upon information and belief, in making the aforesaid order the Court handed down its Memorandum Decision dated January 27, 1971, a copy of which is hereto annexed as Exhibit F and incorporated herein by reference. In that decision the Court found as facts, among other things, that both defendant corporations could not pay their obligations as they matured, could not pay their current obligations, and further found that their liabilities far exceeded their realizable assets. As that decision recites, in the course of the hearing the corporate defendants unsuccessfully sought leave to proceed under Chapter X of the Bankruptcy Act, and in that connection admitted that no new capital could be obtained by them, that their bank accounts had already been applied to outstanding debts due their bank, that they had no funds with which to pay their obligations, current

or otherwise, and that there were no lawful methods to obtain other funds.

22. Upon information and belief, on December 30, 1970 and prior thereto Guaranty Bond was insolvent within the meaning of Section 1(19) of the Bankruptcy Act, or was unable to meet its obligations as they matured, or both.

23. By reason of the foregoing, the 1970 Act does not apply to Guaranty Bond, and the remedies and benefits provided therein may not be invoked by, or for the benefit of, its customers or any other person.

Fourth Defense

24. Repeats and realleges each and every allegation hereinabove contained in paragraphs "13" through "23" inclusive.

25. By reason of the foregoing, the 1970 Act does not apply to Guaranty Bond, and the remedies and benefits provided therein may not be invoked by, or for the benefit of, its customers or any other person.

Fifth Defense

26. Repeats and realleges each and every allegation hereinabove contained in paragraphs "13" through "17" inclusive, and paragraphs "20" through "22" inclusive.

27. Upon information and belief, at or about the time of his appointment as receiver herein on or about January 27, 1971, the petitioner knew of the existence and provisions of the 1970 Act, as admitted by him in paragraph "1" of the petition herein, and had full opportunity to make a prompt determination respecting the applicability thereof in the

circumstances of this case and take appropriate legal or other action to invoke the 1970 Act procedures and remedies.

28. Despite his aforesaid knowledge or notice of the 1970 Act, the petitioner herein elected to execute the duties of his office as receiver and to proceed with the administration and liquidation of Guaranty Bond and Guaranty Bond's Parent.

29. Upon information and belief, the receivership herein embraces both Guaranty Bond and Guaranty Bond's Parent, and the proceedings taken herein relate to the assets and liabilities of both corporations and the liquidation thereof although Guaranty Bond's Parent was not at any time material herein a broker or dealer within the meaning of the 1970 Act or the Exchange Act.

30. On or about May 31, 1971 SIPC received a letter dated May 27, 1971 from the attorney for the receiver herein, a copy of which is hereto annexed as Exhibit G and incorporated herein by reference. Prior thereto SIPC had no knowledge or notice of any of the facts, matters or proceedings hereinabove alleged in paragraphs "13" through "29" inclusive, or any other matters relating to the financial condition of Guaranty Bond or its ability to meet its obligations to its customers or other creditors, or any other matters relating to the administration and proceedings by the petitioner as receiver herein.

31. SIPC's lack of notice or knowledge as aforesaid was not the result of any act or omission on its part, but was caused solely by the failure of others having knowledge of the facts, including the receiver herein, to give SIPC timely notice thereof.

32. Prior to the time SIPC acquired its first notice or knowledge of the circumstances and proceedings herein and had an opportunity to determine its responsibilities, if any, in the circumstances, the receivership herein had progressed to a point of substantial completion, including but not limited to the disposition of various assets belonging to the defendant corporations or certain principals thereof, the return of all or substantially all of the securities in the possession or under the control of the corporate defendants, the resolution of certain claims made against the estates herein, the establishment of a reserve fund to be applied in payment of the expenses of administration, and the approval of a plan for partial liquidation. SIPC begs leave to refer to all of the petitions, orders, decisions, findings of fact and conclusions of law, and other documents and other matters and proceedings which are a matter of record in this Court establishing the status of the receiver's proceedings at a time or at times material to this defense.

33. At no times were the acts, transactions, powers, liabilities or responsibilities of the receiver herein governed or controlled by the 1970 Act.

34. By reason of the foregoing, subsequent to its acquisition of knowledge or notice of the financial difficulties of Guaranty Bond or of the proceedings heretofore had herein, SIPC had no legal right to take any action under the 1970 Act for the protection of customers or other creditors of Guaranty Bond because of the impossibility of accomplishing the purposes of the 1970 Act including the proper liquidation of Guaranty Bond only by a duly appointed trustee in accordance with the terms and provisions of the 1970 Act.

Sixth Defense

35. Repeats and realleges each and every allegation hereinabove contained or realleged in paragraphs "26" through "34" inclusive.

36. Under the 1970 Act SIPC is vested with discretion to determine whether, in a particular case, it shall make an application for a decree adjudicating that customers of a broker-dealer, which is a member of SIPC, are in need of the protection provided by the 1970 Act, and upon such adjudication apply for the appointment of a trustee to liquidate such broker-dealer in accordance with the terms of the 1970 Act.

37. Even if SIPC had the legal authority under the 1970 Act, in the circumstances of this case, to invoke the provisions of the said Act and initiate the procedures therein provided for the protection of customers, which it denies as hereinabove alleged, nevertheless its decision not to do so was a fully justified, proper and required exercise of the discretion vested in SIPC under the 1970 Act as aforesaid, and may not be lawfully superseded or set aside in the circumstances of this case by an order or decree compelling it now to proceed under the 1970 Act.

Seventh Defense

38. This Court lacks jurisdiction in this proceeding.

Wherefore, respondent Securities Investor Protection Corporation demands judgment dismissing the petition herein.

THEODORE H. FOCHT
General Counsel
Securities Investor Protection Corporation
485 L'Enfant Plaza, S. W.
Washington, D. C. 20024
Telephone: 202—484-5400

Dated: Washington, D. C., May 15, 1972.

EXHIBIT A

October 5, 1971

W. Ovid Collins, Jr., Esquire
Cornelius, Collins, Higgins & White
Third National Bank Building
Nashville, Tennessee 37219

Re: Guaranty Bond and Securities Corporation,
Your File No. 5989

Dear Mr. Collins:

This is in response to your letter of September 23, 1971, addressed to Chairman Woodside with regard to Guaranty Bond and Securities Corporation.

As you are aware, the staff of this Corporation has been reviewing this matter for some time, and we have attempted to gather together pertinent information and data. Although we still do not have certain information which would be very helpful to us, for example, information with respect to investigations of the activities of the principals of this company and any reports made by the Receiver on those matters, we can understand your interest in learning the intentions of this Corporation with respect to this company.

Based on the information presently available, this Corporation has no plans for filing an application for the appointment of a Trustee in this proceeding.

Very truly yours

Theodore H. Focht
General Counsel

THF:py

EXHIBIT B

November 1, 1971

W. Ovid Collins, Jr., Esquire
Cornelius, Collins, Higgins & White
Third National Bank Building
Nashville, Tennessee 37218

Dear Mr. Collins:

This is in response to your recent letter inquiring as to the basis for this Corporation's determination that it should not intervene in the matter of Guaranty Bond and Securities Corporation.

There are a number of reasons for our determination, and they are complex and interrelated. Briefly, I would say they involve the question of retroactive application of the statute and the question of the ability of a SIPC trustee to carry out the purposes of the 1970 Act at this point in the liquidation of this company.

Very truly yours

Theodore H. Focht
General Counsel

THF:py

Carbon copy to Mr. James C. Barbour
936 J. C. Bradford Building
Nashville, Tennessee 37219

EXHIBIT C

November 24, 1971

The Honorable William E. Brock, Jr.
United States Senate
304 Old Senate Office Building
Washington, D. C. 20510

Re: LEG:1

Dear Senator Brock:

This is in response to your recent letter concerning Guaranty Bond and Securities Corporation.

As you are aware, the Counsel to the Receiver and the General Counsel of this Corporation have been in communication with each other concerning this matter. I believe that the intentions of this Corporation are set forth in two recent letters addressed to W. Ovid Collins, Jr., Esq., Counsel to the Receiver, from Theodore H. Focht, General Counsel for SIPC. These letters are dated October 5 and November 1, 1971, and I enclose copies of them for your information.

I note, of course, the comments contained in the last paragraph on page two of Mr. Barbour's letter. I assure you that the Directors and staff of this Corporation have made every attempt to provide protection to public customers of broker-dealer firms consistent with the provisions of the Securities Investor Protection Act of 1970. The protections provided by that Act are not unlimited, however, and we are of the present opinion that the limitations contained in the Act make it necessary for this Corporation to decline to intervene in the Guaranty Bond and Securities case.

Sincerely

Byron D. Woodside

THF:py
Enclosures

Chairman

Answer of the
Securities Investor Protection Corporation

EXHIBIT D

In the U. S. District Court for the Middle District of Tennessee, Nashville Division

Securities & Exchange Commission, Plaintiff, v. Guaranty Bond and Securities Corporation, Henry Jeremiah Huey, Jr., Brooks Thomas Huey and Guaranty Bond Co., Inc., 2312 West End Avenue, Nashville, Tennessee 37203, Defendants.	Civil Action File No. 5989

Findings of Fact and Conclusions of Law

(Entered January 6, 1971)

This cause coming on to be heard upon plaintiff's motion for a preliminary injunction, and upon consideration of said motion, the complaint, affidavits, other evidence adduced and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That defendant Guaranty Bond & Securities Corporation, a Tennessee corporation, is engaged in business as a broker and a dealer in securities and for this purpose maintains an office in Davidson County, Tennessee.

2. That since June 20, 1962, defendant Guaranty Bond & Securities Corporation (hereinafter sometimes referred to

as "registrant") has been and is now registered with the Securities and Exchange Commission as a broker and a dealer in securities pursuant to Section 15(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78o(b)].

3. That registrant is a wholly owned subsidiary of defendant Guaranty Bond Company, Inc., a Tennessee corporation (hereinafter sometimes referred to as "parent") with an office in Davidson County, Tennessee; and that defendant Henry Jeremiah Huey, Jr. (H. J. Huey) is President and a director and Brooks Thomas Huey (B. T. Huey) is Secretary, Treasurer and a director of both registrant and parent, and they reside in Davidson County, Tennessee.

4. That since March 31, 1970, registrant has made use of the mails and of means and instrumentalities of interstate commerce to effect transactions in and to induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange while and at times when the net capital of registrant was less than $5,000 and its aggregate indebtedness to all other persons exceeded two thousand (2,000) per centum of its net capital in contravention of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1].

5. That since about May 1, 1969, registrant has failed to make and keep current books and other records relating to its business as a broker and dealer in contravention of Section 17(a) of the Exchange Act [15 U.S.C. 78q(a)] and Rule 17a-3 [17 CFR 240.17a-3], in that it has not maintained a position record for all securities long and short and their locations except for the period since November

17, 1970; it has not maintained ledger accounts for customers itemizing purchases, sales, receipts and deliveries of securities, all receipts and disbursements of cash and all other debits and credits; its inventory of securities has been inaccurate; its income account has failed to reflect all income received; its net capital computations have been incorrect; and it has not had personnel questionnaires for certain associated persons.

6. That since about May 1, 1969, registrant has made use of the mails and means and instruments of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, practices and courses of business as specified in paragraphs numbered 7 and 8 hereof, in contravention of Section 15 (c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rules 15c1-4 [17 CFR 240.15c1-4] and 15c1-6 [17 CFR 240.15c1-6].

7. That since about May 1, 1969, registrant has effected with and for the accounts of customers, transactions in, and has induced the purchase and sale by customers of, securities (other than U. S. Tax Savings Notes, U. S. Defense Savings Stamps or U. S. Defense Savings Bonds, Series E, F and G) without at or before the completion of each such transaction giving or sending to such customers written notification disclosing, in cases where registrant was acting as a broker for such customers or as a broker for both such customers and some other person, either the name of the person from whom the security was purchased

or to whom it was sold for such customers and the date and time when such transaction took place or the fact that such information would be furnished upon the request of such customers, and the source and amount of any commission or other remuneration received or to be received by registrant in connection with the transaction as prescribed in Rule 15c1-4 [17 CFR 240.15c1-4].

8. That since about May 1, 1969, registrant, as a broker acting for customers and for customers and other persons, has engaged in acts designed to effect with or for the accounts of such customers, transactions in, and purchases and sales by such customers of, securities in the primary or secondary distributions of which registrant was participating and was financially interested without, at or before the completion of each such transaction, giving or sending to such customers written notification of the existence of such participation or interest as prescribed in Rule 15c1-6 [17 CFR 15c1-6].

9. That since about May 1, 1969, registrant, as a broker and dealer not a member of a national securities association, has effected securities transactions in contravention of Section 15(b)(10) of the Exchange Act [15 U.S.C. 78o (b)(10)] and Rule 15b10-5 [17 CFR 240.15b10-5], in that registrant has exercised discretionary power or authority for customers without such customers having given their prior written authorizations to exercise such power or authority to a stated associated person or persons, and having indicated their reasons for giving such authorizations.

10. That since about May 1, 1966, registrant has been a broker and dealer engaged in the business of effecting

securities transactions for the accounts of others and for its own account, has been making use of the mails and of means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of, securities (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances, including the acts, practices and courses of business specified in paragraphs numbered 6 through 14 hereof, in contravention of Section 15(c)(1) of the Exchange Act [15 U.S.C. 78o(c)(1)] and Rule 15c1-2 [17 CFR 240.15c1-2].

11. That since about May 1, 1966, defendants have been soliciting churches and other religious institutions to employ registrant as underwriter for the sale of their bonds under a program in which registrant guarantees the sale of such bonds on the representation that registrant is able to make such a firm commitment for the purchase and sale of such securities, is able to meet all obligations and liabilities arising in connection therewith and in operating within the jurisdiction of the federal and state authorities charged with regulating the securities industry, while and at times when registrant was unable to meet the net capital requirements of Section 15(c)(3) of the Exchange Act [15 U.S.C. 78o(c)(3)] and Rule 15c3-1 [17 CFR 240.15c3-1], registrant's report on Form 17A-5 as of March 31, 1970, as filed with the Commission, inaccurately reflected registrant's assets and liabilities and inaccurately indicated that registrant had sufficient net capital to meet the requirements of said Rule, and registrant omitted to disclose to such churches and other religious institutions its financial condition and its inability

to meet the financial responsibility requirements of said Rule and its failure to comply with applicable federal laws and regulations relating to the securities industry as found in paragraphs numbered 4 through 16 hereof.

12. That since about May 1, 1966, defendants have been inducing churches and other religious institutions (hereinafter sometimes referred to as "borrowers") to execute underwriting agreements in which registrant is designated underwriter of their bonds and custodian of funds received from sales thereof and which contain a provision that registrant may invest such funds in religious institutional bonds for such borrowers, as necessary liquidate such investments, make disbursements and deliver funds for payment of such borrowers' obligations incurred in their construction and other programs, and return to such borrowers 5% simple interest earned on such funds. On the basis of this authority defendants have been exercising discretionary authority over funds received from sales of bonds issued by such borrowers and over such borrowers' accounts with registrant, effecting transactions therewith and therein, including sales to such borrowers of bonds issued by other churches and religious institutions having extended maturities without sending to such borrowers confirmations advising them of the securities sold to them and placed in their accounts, the date and amount of each such transaction and the source and amount of commission and other remuneration received or to be received by defendants in connection with each such transaction. Registrant has been crediting to the accounts of such borrowers 5% simple interest on the amounts invested for such borrowers in the bonds of other churches and religious institutions even though the interest rates on the bonds

placed in such borrowers' accounts have been substantially higher and defendants have retained and treated as income to registrant the interest differential between the 5% rate paid to such borrowers and the substantially higher yields on the bonds placed in their accounts, thus obtaining secret profits from such borrowers while acting in the capacity of their agent, custodian and fiduciary. Registrant has been, in some instances, investing funds held as custodian for a particular religious institution in such institution's own bonds with the result that such institution has been paying interest on such bonds at a rate in excess of 5% per annum while receiving a credit to its account with registrant of only 5% per annum, registrant retaining the interest differential as a secret profit.

13. That since about May 1, 1966, registrant, as a broker and dealer, has been soliciting churches and other religious institutions to employ it as underwriter of their bonds and has solicited investors to purchase such bonds on the representations that the sale of all bonds so underwritten by registrant is guaranteed by it and that registrant will purchase or sell any such bonds remaining after the church has put forth its best effort, without disclosing that registrant has been placing a substantial portion of such bonds in the accounts of other churches and religious institutional issuers for which it has been acting as underwriter and for which it has been holding funds as custodian by recording buy and sell transactions in securities on registrant's books among various of such churches and other religious institutional issuers; that availability of funds for a particular such issuer's construction or other program could be dependent upon registrant's ability to dispose of the

securities in which such funds were thus invested; that there is no independent market for such securities; and that such issuers whose funds are invested by registrant in securities of other churches and religious institutions may suffer the loss resulting from any default on the part of an issuer of a security in which their funds are invested.

14. That since about May 1, 1966, registrant, as a broker and dealer, has been offering to sell and selling religious institutional bonds through the use of prospectuses prepared by registrant which are materially false and misleading in that such prospectuses contained the representation that the proceeds from the sale of the religious institutional bonds described in such prospectus would be disbursed by registrant in accordance with the purposes of the bond issue as set out in such prospectus—*i.e.*, for such expenditures as consolidation and retirement of existing indebtedness, purchase of land for new buildings and construction, expansion and remodeling of churches, sanctuaries, educational buildings and other facilities—without disclosing: that registrant in its discretion would invest portions of such proceeds in other religious institutional bonds having extended maturities of from one to more than eleven years; the amounts of such proceeds to be received by registrant and the other defendants as fees, commissions and other remunerations; and that registrant would use such proceeds in completing other underwritings in which it and the other defendants would receive substantial fees, commissions and other remuneration.

15. That since about May 1, 1966, registrant, as a broker and dealer, by use of means and instrumentalities of interstate commerce and of the mails, directly and indirectly, has been employing manipulative and deceptive devices

and contrivances in contravention of Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b1-5], in that registrant has been:

(a) Engaging in acts, practices and courses of business which operate and would operate as a fraud and deceit upon customers of registrant as described more particularly in paragraphs 11 through 14 hereof;

(b) Making untrue statements of material facts, namely, the statements set forth in paragraphs 11 through 14 hereof; and

(c) Omitting to state the facts specified in paragraphs 11 through 14 hereof relating to registrant's financial condition, its lack of sufficient capital to meet the requirements of the federal laws and rules relating to financial responsibilities of securities brokers and dealers, its mode of operations, its secret profits from transactions in discretionary accounts, and details of transactions in which funds and securities are transferred among accounts of customers on the books of registrant, which facts are material in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

16. That since about May 1, 1966, registrant, as a broker and dealer, in offers and sales of securities by use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly has been:

(a) Obtaining money and property by means of the untrue statements of material facts as set forth in paragraphs 11 through 14 hereof;

(b) Obaining money and property by means of the omissions to state material facts as set forth in paragraphs 11 through 14 hereof, which facts are necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; and

(c) Engaging in the transactions, practices and courses of business described in paragraphs 11 through 14 hereof, which operate and would operate as a fraud and deceit upon the purchasers of such securities.

17. That in a letter dated September 24, 1970, from the Atlanta Regional Office of the Securities and Exchange Commission, defendants were advised of the net capital requirements of Rule 15c3-1, the bookkeeping requirements of Rule 17a-3 and the confirmation requirement of Rule 15c1-4 and were further advised that according to an examination made of registrant's business, it was apparently violating these rules; but that subsequent to receipt of such letter, registrant continued to effect transactions without complying with the requirements of said rules.

12. That defendants Guaranty Bond Company, Inc. H. J. Huey and B. T. Huey aided and abetted registrant in the acts, practices and transactions set forth in paragraphs 4 through 17 hereof.

19. It was of interest to the Court that the defendants admitted all of the enumerated violations except they

stated their disagreement with the method of computation of the 20 to 1 capital requirement rule but submitted no alternate method of computation even though they called as a witness a certified public accountant who claimed to have expertise in the field of compliance with the requirements of the law and those of the regulations of the Securities and Exchange Commission. The defendants admitted that by corporate resolutions the earnings of Guaranty Bond and Securities Corporation were diverted to its parent and sole stockholders, Guaranty Bond Co., Inc. They admitted taking secret profits as a fiduciary but had no plans to make any restitution.

The principal defenses of the defendants were that they were not vicious persons and that the security investigators for the Securities and Exchange Commission should have furnished more help to defendants in their attempt to comply with the law and regulations.

Furthermore, as late as January 2, 1971, the defendants withdrew from circulation certain advertising matter. At the same time it solicited from its customers a discretionary account authorization. The defendants did not advise its customers as a part of said solicitation that this injunction suit was pending nor that its illegal representations previously made to them were not effective.

The defendants contend that they are entitled to another chance. However, they admit that they cannot comply with the capital requirements.

In addition, the defendants have as of January 2, 1971 prepared a confirmation form to be sent to their customers confirming a sale. This form will not show, and the defendants so admit, the dollar amount of the commission charged by the defendants. Their excuse is that it is too

difficult to compute the amount of commission. Furthermore, they contend that the confirmation form is coded so as to refer to 33 separate formulas printed in numerical order on the reverse side of the confirmation form. The defendants do not attempt to explain how a layman can determine, from the applicable formula, the amount to the commission when it is difficult for the defendants to compute same.

It is obvious that the defendants cannot and will not comply with the applicable laws and regulations. Furthermore, defendants will, unless restrained and enjoined, continue to engage in the acts and practices described hereinbefore.

Conclusions of Law

1. That the acts and practices set forth in the preceding Findings of Fact constitute violations of Sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b), 78o(b)(10), 78o(c)(1), 78o(c)(3) and 78q(a)], Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 [15 U.S.C. 77q(a)(2) and 77q(a)(3)] and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 [17 CFR 240.10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3].

2. That plaintiff is entitled to a preliminary injunction against defendant Guaranty Bond and Securities Corporation, its officers, agents, servants, employees and attorneys, and each of them, restraining and enjoining them from further violations of Sections 10(b), 15(b)(10), 15(c)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b), 78o(b)(10), 78o(c)(1), 78o(c)(3) and 78q(a)], Sections 17(a)(2) and 17(a)(3) of the Securities Act

of 1933 [15 U.S.C. 77q(a)(2) and 77q(a)(3)] and Rules 10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3 [17 CFR 240.10b-5, 15b10-5, 15c1-2, 15c1-4, 15c1-6, 15c3-1 and 17a-3], and against defendants Henry Jeremiah Huey, Jr., Brooks Thomas Huey and Guaranty Bond Co., Inc., their officers, agents, servants, employees and attorneys, and each of them, restraining and enjoining them from aiding and abetting defendant Guaranty Bond and Securities Corporation in any further violations of said sections and rules.

/s/ L. CLURE MORTON
United States District Judge

EXHIBIT E

In the U. S. District Court for the

Middle District of Tennessee
Nashville Division

Securities and Exchange Commission *vs.* Guaranty Bond and Securities Corporation; Henry Jeremiah Huey, Jr.; Brooks Thomas Huey; and Guaranty Bond Co., Inc., 2312 West End Avenue, Nashville, Tennessee 37203	No. 5989

Agreed Order

(Entered January 29, 1971)

This cause came on to be heard on January 27, 1971, upon defendants' motion to amend the preliminary injunction entered herein on January 6, 1971, and plaintiffs' applications for appointment of a Receiver for Guaranty Bond and Securities Corporation and Guaranty Bond Co., Inc.; and upon consideration of said motion and applications, the record made in this cause, and arguments of counsel; and the Court being fully advised in the premises:

1. It is ordered, adjudged and decreed that defendants' motion be and it hereby is denied.

2. It appearing to the Court that Receivership is the only remedy that will adequately protect the interests of churches and other religious institutions for which Guaranty Bond and Securities Corporation has been acting as underwriter and the interests of other customers and creditors of the aforesaid corporations, and the said corporations concurring in the request for and agreeing to the appointment of a Receiver, it is ordered, adjudged and decreed that James C. Barbour of Nashville, Tennessee is appointed Receiver of said corporations subject to the submission of a good and sufficient bond in the amount of One Hundred Thousand Dollars ($100,000.00), conditioned upon the faithful performance of his duties as said Receiver, having taken the oath required by law, and being otherwise qualified.

3. It is further ordered, adjudged and decreed that the said Receiver shall take immediate custody, control and possession of all funds, property, premises and other assets of or in the possession or under the control of said corporations, wherever constituted, with full power to collect, receive, and take into possession all goods, chattels, rights, credits, monies, effects, securities, lands, books and records of account, and other papers and documents of said corporations; to preserve and protect all such assets, pending further order of this Court, in order to prevent the irreparable loss, damage and injury to customers and other creditors, to conserve and prevent withdrawal and misapplication of funds and other properties entrusted to said corporations; and upon the Court's approval, to determine, adjust and protect the equities of creditors, customers and investors whose funds and other properties have been entrusted to or invested with said corporations.

4. It is further ordered, adjudged and decreed that the Receiver shall not surrender, sell, or otherwise dispose of any of the assets within his care, custody, and control or properties entrusted to him, including but not limited to the right to sell securities for cash to meet construction requirements, except upon notice to all parties of record and the opportunity to be heard thereon, unless such immediate disposition be required in order to prevent irreparable damage, and then only upon prior approval of the Court.

5. It is further ordered, adjudged and decreed that the corporations, their officers, agents, managers and employees be and they hereby are commanded and required to deliver over to said Receiver possession and custody of all funds, securities, property, premises and other assets, and all books and records of accounts, title, documents and other papers of said corporations, and that its officers, agents, managers and employees be and they hereby are enjoined and restrained from interfering with said Receiver taking such custody, control and possession, and from interfering in any manner, directly or indirectly, with such custody, possession and control by said Receiver.

6. It is further Ordered. Adjudged and Decreed that General Insurance Underwriters, a division of Guaranty Bond Co., Inc., be and the same hereby is enjoined from making any disbursements except for weekly payroll checks to those employees of General Insurance Underwriters who are now employees of said insurance business, except that no such payments are to be made to the defendants, Henry Jeremiah Huey, Jr. and Brooks Thomas Huey.

7. It is further Ordered, Adjudged and Decreed by the Court that said Receiver shall have full power and authority until further order of this Court:

(a) To employ, discharge and fix the compensation of such employees as he may deem necessary and advisable for the preservation and protection of the within estate;

(b) To acquire for cash or on credit such supplies, services or other property as he may deem necessary and advisable in connection with the preservation and protection of the said estate;

(c) To enter into any contracts incidential to the preservation and protection of the said estate;

(d) To collect and receive all monies or other properties due or to become due to the said estate, and to hold and retain the same, subject to further orders of Court.

(e) To do such things and to incur such expenses as may be necessary and advisable in the preservation and protection of the said estate.

(f) To institute and maintain legal action for the preservation and protection of said estate upon prior Court approval.

8. It is further ordered, adjudged, and decreed that upon prior approval of the Court, the Receiver is authorized to retain counsel for the purpose of representing him in this cause.

9. It is further ordered, adjudged and decreed that all parties, firms, corporations, partnerships and other persons are hereby enjoined and restrained from instituting or maintaining any action of any kind or character, includ-

ing but not limited to any action that might impose a lien on the assets of the corporations, against the said corporations and the said Receiver, until further order of Court; provided, however, that any action presently pending in state courts is hereby restrained for sixty (60) days, after which time judgement may be obtained if proper, but the enforcement of said judgment is enjoined and said judgment creditor is required to come in and file his claim in this Court.

10. It is further ordered, adjudged and decreed that the Receiver, after making an investigation of the affairs of the said estate shall submit a recommendation to this Court for appropriate steps to be taken to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter, and the interests of creditors and other persons dealing with the said corporations.

11. It is further ordered, adjudged and decreed that the defendants, Henry Jeremiah Huey, Jr. and Brooks Thomas Huey, without objection by them, be and they are hereby enjoined from disposing of any of their assets without obtaining the Court's prior approval except for reasonable living expense.

12. It is further ordered, adjudged and decreed that the Receiver make publication in a newspaper of general circulation in Davidson County, Tennessee, notifying all the creditors of said corporations of this Receivership, and requiring them to file and prove their respective claims against the corporations on or before September 1, 1971, or they may be excluded from the benefits of this proceeding.

13. It is further ordered, adjudged and decreed that the Court reserves the right to make and enter such further orders or decrees, upon application of said Receiver or otherwise, that may be necessary for the guidance of said Receiver in his administration of the Receivership herein established.

Entered this the 27th day of January, 1971.

/s/ L. CLURE MORTON
United States District Judge

Approved for Entry

J. CECIL PENLAND
JENNIE H. RANDOLPH
Attorneys for Securities and
Exchange Commission

BOULT, CUMMINGS, CONNERS & BERRY
By ED R. DAVIES

By ROBERT P. (Illegible)
Attorneys for Intervenors

FRANK S. KING
Attorney for the Defendants

Answer of the
Securities Investor Protection Corporation

EXHIBIT F

In the United States District Court for the
Middle District of Tennessee

Nashville Division

Securities & Exchange Commission, *vs.* Guaranty Bond and Securities Corporation, et al.	Civil Action No. 5989

Memorandum

(Entered February 9, 1971)

This cause came on to be heard upon the petition of the Securities & Exchange Commission for the appointment of a receiver for the corporations Guaranty Bond and Securities Corporation and Guaranty Bond Co., Inc. The defendants made an oral application for permission to proceed under Chapter X of the Bankruptcy Act. However, they admitted that (1) no new capital could be obtained; (2) their bank accounts had been applied to outstanding debts due their bank; (3) they had no funds to pay their obligations, current or otherwise; and (4) there were no lawful methods to obtain other funds.

On denial of their request for leave to proceed under Chapter X of the Bankruptcy Act, and the denial of their motion of January 13, 1971, the corporate defendants orally joined in the petition of the plaintiffs for the appoint-

ment of the receiver to take possession of the assets of the defendant corporations and to wind up their affairs. These defendants asserted to the Court that any delay in such appointment and administration would severely prejudice the defendants and their creditors.

The intervenors requested that the individual defendants, Huey, be enjoined from disposing of any of their personal assets pending the outcome of this litigation. These defendants, through their attorney, orally agreed for such injunction to issue.

The testimony of the witnesses and the records of the defendant corporations filed in this case clearly reflect that the defendant corporations cannot pay their obligations as they mature, cannot pay their current obligations and that their liabilities far exceed their realizable assets and this Court so holds.

A receiver will be appointed and, absent any bankruptcy proceedings, he will conserve, administer and liquidate the affairs and assets of the defendant corporations. An injunction will issue restraining the individual defendants, Huey, from disposing of their personal assets. All creditors and parties having claims will be permitted, without further order, to intervene.

An appropriate order will be prepared and entered.

This the 27th day of January, 1971.

/s/ L. CLURE MORTON
United States District Judge

Response of the Securities and Exchange Commission

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[CAPTION OMITTED]

(Filed: May 17, 1972)

The Securities and Exchange Commission files this Response to Receiver's Petition No. 22:

1. The Commission admits the allegations of Paragraph 1 of the Petition, in that the Atlanta Regional Office wrote a letter dated February 4, 1971, to the Receiver, advising him of the possible applicability of the Securities Investor Protection Act ("SIPA").

2. The Commission admits the allegations of Paragraph 2 of the Petition, in that the Atlanta Regional Office sent information on February 2, 1971, to the Commission's headquarters in Washington, D. C., on the circumstances of Guaranty Bond and Securities Corporation, except that it denies that the Atlanta Regional Office purported to send "required notice" to Washington, D. C., under SIPA, and except that the Atlanta Regional Office did not state on May 5, 1971, that the information might have been delayed in reaching the Securities Investor Protection Corporation ("SIPC") but mentioned the possibility to the Receiver at a later date, perhaps as late as October 1971.

3. The Commission admits the allegations of Paragraphs 3 and 4 of the Petition, except that it is without

knowledge or information sufficient to form any belief as to the nature and extent of the information supplied to SIPC, as alleged in the first sentence of Paragraph 4 of the Petition.

4. The Commission admits the allegations of Paragraphs 5 through 7 of the Petition.

5. The Commission admits the allegations of the first five lines of Paragraph 8 of the Petition. The Commission denies the last three lines of the Paragraph, in that a letter dated February 10, 1972, from David Ferber, Solicitor of the Commission, was sent to Receiver's counsel, enclosing a copy of a letter dated July 1, 1971 from Sheldon Rappaport, Associate Director of the Division of Trading and Markets, to Mr. Woodside, Chairman of SIPC, together with a memorandum attached to the letter, describing the circumstances of Guaranty Bond and Securities Corporation. Copies of this correspondence are attached hereto as Exhibit A. The letter dated July 1, 1971 did not purport to be the statutory notice required by Section 5(a)(1) of SIPA and was sent at SIPC's request following an inquiry which Receiver's counsel made to SIPC.

6. The Commission, as to the allegations contained in Paragraph 9 of the Petition, admits that Guaranty Bond and Securities Corporation was a registered broker-dealer when SIPA took effect on December 30, 1970, and appears to have continued to be engaged in the securities business until at least January 5, 1971.

As to the allegations that SIPA coverage should be extended to customers of Guaranty Bond and Securities Corporation, the Commission is of the view that SIPA coverage should not be withheld merely because the Com-

mission filed this action prior to the effective date of SIPA, or because the firm was in net capital violation in 1970, since it appears that the firm continued to engage in the securities business until at least January 5, 1971. Action by SIPC is necessary, however, only if it appears that the firm will otherwise fail to meet its obligations to customers. There has been no demonstration that the customers of Guaranty Bond and Securities Corporation will in fact sustain any losses. In this connection, from information obtained from SIPC, it appears that the Receiver, as Receiver of Guaranty Bond and Securities Corporation, may have causes of action for damages or restitution against either the parent, Guaranty Bond Co., Inc., or against individual principals of the parent, which could redound to the benefit of the customers of Guaranty Bond and Securities Corporation.

7. The Commission admits as to the allegations of Paragraphs 10 through 12 of the Petition that it has a duty under Section 5(a)(1) of SIPA to notify SIPC that a member of SIPC is in or approaching financial difficulty. The Commission, however, is of the view that it is irrelevant to whether SIPA coverage is applicable whether the Commission formally advised SIPC under Section 5(a)(1) of the Act. The Commission is of the view that notification is not a condition precedent to coverage under SIPA and does not constitute either authorization to or compulsion on SIPC to bring action.

8. The Commission is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 13 of the Petition.

Response of the
Securities and Exchange Commission

9. Paragraph 14 of the Petition states a legal conclusion, as to which the Commission takes no position at this time.

Respectfully submitted

DAVID FERBER
Solicitor

ROBERT E. KUSHNER
Assistant General Counsel

MICHAEL A. MACCHIAROLI
Attorney
Securities and Exchange Commission
500 North Capital Street
Washington, D.C. 20549
(202) 755-1170

J. CECIL PENLAND
Assistant Regional Administrator
Securities Exchange Commission
Atlanta Regional Office
Suite 138
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

May 15, 1972

Response of the
Securities and Exchange Commission

EXHIBIT A

February 10, 1972

W. Ovid Collins, Jr. Esq.
Cornelius, Collins, Higgins & White, Esqs.
18th Floor, Third National Bank Building
Nashville, Tennessee 37219
Re: Guaranty Bond & Securities Corporation

Dear Mr. Collins:

This is in reply to your letter of January 31, 1972.

I am enclosing a copy of a letter dated July 1, 1971, from Sheldon Rappaport to Mr. Woodside, chairman of SIPC, together with the memorandum attached to the letter. The letter and memorandum constitute the only reference to the condition of Guaranty Bond & Securities Corporation made by the Commission to SIPC. As you will note from the letter, it was sent at SIPC's request following an inquiry which you made to SIPC.

You ask our advice as to the proper venue of a proceeding to raise the issues regarding SIPC. I am sorry, but we have not researched this question.

In considering the merits of the issues you raise, we would appreciate your advice as to whether Guaranty Bond and Securities Corporation did business with customers subsequent to December 30, 1970. If so, could you furnish us a schedule showing the customers' names and addresses, the securities purchased or sold, the dollar amounts of the purchases or sales, and the present indebtedness owed to such customers?

Thank you very much.

Your truly

David Ferber, Solicitor
Office of General Counsel

Response of the
Securities and Exchange Commission

July 1, 1971

Mr. Byron D. Woodside, Chairman
Securities Investor Protection
Corporation
Suite 104
955 North L'Enfant Plaza
Washington, D.C. 20004

Dear Mr. Woodside:

Enclosed is the data you requested concerning Guaranty Bond and Securities Corp. ("Registrant"), a registered broker-dealer and member of SECO. Pursuant to Commission authorization the Atlanta Regional Office, on January 6, 1971, obtained an order in the United States District Court for the Middle District of Tennessee enjoining the Registrant from violations of applicable financial responsibility and bookkeeping requirements. On January 29, 1971 a receiver was appointed by the court. The Commission has authorized me to notify you of these facts.

We are advised that you are already in contact with the receiver. If we can be of further help in this matter, please let us know.

Sincerely

Sheldon Rappaport
Associate Director

Enclosure

Response of the
Securities and Exchange Commission

MEMORANDUM

RE GUARANTY BOND & SECURITIES CORP. (8-10785)

This is a case in which a church bond dealer was operating in violation of the net capital, bookkeeping, confirmation and other rules. As an underwriter of religious institutional bonds, it acted in a fiduciary capacity for churches as custodian of funds raised and made investments for them on a discretionary basis in other securities being underwritten by Registrant without making required disclosures of its adverse interests and its secret profits. It did not disclose to churches what securities were placed in their accounts under its discretionary authority. It entered into firm commitments for underwritings of large amounts of church bonds at a time when it had insufficient capital to meet the requirements of the net capital rule. Guaranty Bond and Securities Corp. ("Registrant") has been registered with the Commission as a broker-dealer since June 20, 1962. It is a SECO broker-dealer, not being a member of a national securities association registered with the Commission.

Registrant was primarily engaged in underwriting such bonds through a program, referred to as Plan III, "which guarantees churches the complete sale of all bonds." Generally, under this plan, Registrant first supervises a 30 day solicitation of the church membership. Upon completion of the initial drive among members of the church, a report was submitted to Registrant together with all the proceeds of the bonds to be issued and the unsold portion of the bonds. Registrant, in its underwriting contract, agreed to sell the remaining bonds and to deliver funds to the church for the institution's obligations incurred in its construction or other programs. In the meantime, Registrant acted as custodian of all funds raised through sale of bonds, both those sold by the church and through Reg-

istrant's separate efforts. Registrant's usual form of underwriting contract contained a clause to the effect that "the underwriter as custodian will invest such funds in religious institutional bonds for the borrower (church) and, as necessary, liquidate investments, make disbursements, and deliver funds in accordance with" the agreement to pay the churchs' obligations under their construction programs, etc. On the basis of this general authority, Registrant exercised complete discretionary authority over all funds received from sales of such bonds and over the churchs' accounts, effecting transactions therein at will including purchases and sales of bonds between the various religious institutions' accounts for whom it acted as underwriter.

The church customers usually were credited with only 5% interest on the funds invested by Registrant in bonds for their accounts even though many of such bonds yield 6% to 7¼%, or more, and Registrant retained the interest differential as income to itself without advising the customer-church of the amount thereof.

Registrant received a basic service charge and commissions on transactions which were transferred immediately to Registrant's parent, Guaranty Bond Company, Inc., through a transfer account without such fees being taken into the income account of Registrant. Parent is owned principally by a partnership made up of H. J. Huey, T. B. Huey and the estate of their deceased brother E. E. Huey. At times Registrant placed bonds in the account of its parent and resold church bonds for its parent.

Registrant was licensed in 16 states, employed over 50 people and had a large volume of business including 80 underwritings of bonds having a face value of over $15,000,000 for the year ended in May 1970.

Response of the
Securities and Exchange Commission

A financial inspection of Registrant as of September 30, 1970 disclosed Registrant's financial position to be as follows:

Aggregate Indebtedness	$ 782,531.54
Required Minimum Net Capital Under Rule 15c3-1(a)(1)	39,126.58
Net Capital Before Deduction on Proprietary Securities (Deficit)	(—359,531.72)
Deduction of Unrealized Loss on Open Contractual Commitments	3,127,700.00
Net Capital (Deficit)	(—3,481,231.72)
Net Capital Required	39,126.58
Additional Capital Required	3,526,350.30
Excess of Total Assets Over Total Liabilities	116,857.35

The amount of open contractual commitments, $3,127,700.00 included in these calculations represent 100% of the amounts of securities having no market value taken by Registrant as underwriter on consignment in which it "agrees to underwrite the purchase and/or placement" of all bonds of the particular issue, which remained unsold and unplaced. It does not include any amount for the additional obligation Registrant has to eventually resell bonds it has placed in church accounts so as to provide them with funds as needed to meet their construction projects. As of September 30, 1970, bonds with a face amount of $8,948,200 had been placed in and were being held by Registrant for the accounts of such issuer-customers.

On September 24, 1970, a letter from the Atlanta Regional Office sent to Registrant and each of its officers and direc-

tors advised them of the net capital and bookkeeping requirements of Rules 15c3-1 and 17a-3 as well as various other rules and of the firm's failure to comply with such requirements as indicated by an inspection of its records. A written response to the Atlanta Regional Office's letter of September 24 was requested. A telegram, dated October 1, 1970, was later received from Registrant stating that the firm had employed a national accounting firm to upgrade its accounting system and in the interim the deficiencies called to its attention were being corrected. Even though the letter of September 24 advising the Registrant that any further business might be deemed willful violations, Registrant effected numerous transactions.

On the basis of these facts the Commission obtained an injunction and a receiver.

District Court Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION

vs.

GUARANTY BOND AND SECURITIES CORPORATION, et al.

MEMORANDUM—No. 54

On December 22, 1970, the Securities and Exchange Commission (hereinafter the "Commission") filed a complaint and moved for a preliminary injunction against Guaranty Bond and Securities Corporation (hereinafter "Guaranty") on the basis of alleged violations of the Securities Exchange Act of 1934 and of the Securities Exchange Act of 1933. On January 6, 1971, the injunction was granted, and this court found, among other things, that Guaranty had violated the Commission's net capital rule by doing business (1) while its net capital was less than $5,000, and (2) while its aggregate indebtedness exceeded 2,000 per centum of it net capital, see § 15(c)(3) of the Exchange Act, 15 U.S.C. § 78o(c)(3) and Rule 15c3-1, 17 C.F.R. 240.15c3-1, and that the net capital violation had existed for a substantial period of time prior to the filing of the complaint by the Commission. In the period from December 22, 1970, to January 6, 1971, Guaranty continued to do business, and prior to January 6, handled 101 transactions during 1971. Then, pursuant to

the Commission's motion, a receiver was appointed by agreed order entered on January 29, 1971.

On May 27, 1971, the receiver made demand upon the Securities Investor Protection Corporation (hereinafter "SIPC") for protection of Guaranty's customers under the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa, *et seq.* (hereinafter the "Act"), but SIPC refused. The Commission had not given SIPC a formal notice as provided by § 5(a)(1) of the Act that Guaranty was approaching financial difficulty, and had taken no other action to see that SIPC intervened. On April 6, 1972, pursuant to the receiver's petition, an order was entered requiring the Commission and SIPC to show cause why the remedies afforded by the Act should not be made available in this situation. Guaranty has been registered with the Commission as a broker-dealer under § 15 of the Securities Exchange Act, 15 U.S.C. § 78o, since June 20, 1962, and was therefore a member of SIPC on December 30, 1970, the date the Act became effective. See § 3(a) of the Act, 15 U.S.C. § 78ccc(a). The case is now before the court upon SIPC's response, which asserts three principal reasons why the relief requested should be denied: (1) lack of personal jurisdiction over SIPC; (2) lack of subject matter jurisdiction; and (3) exclusion of Guaranty by the terms of the Act.

Personal Jurisdiction

SIPC alleges that it is a non-resident foreign corporation created by Congress and that effective service of process can only be achieved in accordance with Rule 4(d)(7), 4(e) and 4(f) of the Federal Rules of Civil Procedure, which in turn would require application of Tennessee law governing service of process on foreign corporations. SIPC asserts that since it is not doing business in Tennessee, it is not subject to service of process issued in Tennessee.

This contention must be rejected. The Act plainly provides that SIPC will impose assessments on its members, collect these assessments through its collection agent, and extend protection to customers of its members. Since many members of SIPC are located within the state of Tennessee, it necessarily follows that the execution of these statutory activities anticipates a continuing relationship between SIPC and its members and customers, and the doing of these acts within the state of Tennessee necessary to achieve the purposes for which the Act was conceived. The nature of this relationship and the protection which SIPC affords Tennessee investors is sufficient in this court's opinion to warrant the exercise of in personam jurisdiction consistent with due process, and to be " . . . such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe* v. *State of Washington*, 326 U.S. 310, 316 (1945). *See also, McGhee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

The court finds this holding to be consistent with the Tennessee long-arm statute, T.C.A. § 20-235, *et seq.*, which has been construed by the Tennessee courts as conferring " . . . jurisdiction over non-resident defendants to the extent permitted by the due process clause," *Darby* v. *Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423, 426 (1970), and in accord with this circuit's interpretation of that statute's permissible breadth under the due process clause of the Fourteenth Amendment. *See King* v. *Hailey Chevrolet*, 462 F.2d 63 (6th Cir. 1972); *Southern Machine Company* v. *Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). Certainly it can be said that ". . . Tennessee has an interest in resolving the conflict at issue. . . ." *Southern Machine Company* v. *Mohasco Industries, Inc., supra*, at 384.

District Court Opinion

SUBJECT MATTER JURISDICTION

SIPC asserts that although by § 3 of the Act it is made subject to and granted all the powers conferred upon a non-public corporation by the District of Columbia Non-Profit Corporation Act, and is granted additional powers under subsection (b) to sue and be sued in any court, state or federal, there is a clear congressional mandate that enforcement actions against SIPC must be brought where its principal office is located. This assertion is based upon the fact that § 7(b) provides that in the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligation under the Act, and that had the Commission elected to seek enforcement in this case, the action would have to have been brought in Washington, D. C., the location of the principal and only office of SIPC.

For this reason, SIPC asserts that the court lacks subject matter jurisdiction to adjudicate the relief sought. The court finds this contention without merit, for the effect of such a proposition would not only be to substantially frustrate a principal goal of the Act—protection of public investors, but would also render meaningless the language of § 3(b)(1) which confers upon SIPC the right to sue and be sued in any court, state or federal. Had the instant proceeding been instituted in this court by the Commission rather than the receiver, then under § 7(b) of the Act dismissal of the action for improper venue if not lack of subject matter jurisdiction might logically be required. However, the fact that the receiver's enforcement action here is of the same type which, under § 7(b), the Commission may

institute in the district court coterminous with the locale of SIPC's principal office does not compel the conclusion that the receiver must do likewise, nor that district courts other than those of the District of Columbia lack subject matter jurisdiction over claims arising under the Act. If substance and meaning are to be given to the Act and to the legislative goal of investor protection, then the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers. When such an occasion arises, § 7(b) must be read in *pari materia* with § 3(b)(1) so as to provide a forum of practical utility to the parties involved and which can give meaningful effect to the Act as a whole in the protection of SIPC's members and their customers located throughout the country.

Since the jurisdictional interpretation sought by SIPC would, in severely limiting access to the courts, run counter to these considerations, the court finds that the provisions of § 7(b) do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of SIPC.

Exclusion of Guaranty Under the Act

SIPC contends that the application of the Act to this case would be to give it an unlawful retroactive effect. There is no dispute that the Act was intended to operate prospectively only. As stated by the court in *Lohf* v. *Casey*, 330 F. Supp. 356, 358 (D. Colo. 1971), *aff'd.* 446 F.2d 618 (10th Cir. 1972):

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:

> "'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H. R. Rep. No. 1613, 91st Cong., 2nd Sess. 4 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'
>
> "This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

As further evidence of the scope of coverage envisioned by Congress, Representative Moss, one of the proponents of the Act and a member of the Conference Committee stated:

> "This is not anticipated as bailing out those firms or their customers. This would be outside the scope of this bill. This bill does not cover retroactively." 116 Cong. Rec. 39,362 (1970).

Notwithstanding the prospective provisions of the Act, there remains the problem of whether the relief sought here would constitute a retroactive application. The Act provides that the rights of claimants are fixed as of the "filing date". In explanation of this term, §5(b)(4)(B) provides:

> "(B) *Filing date.*—The term 'filing date' means the date on which an application with respect to any debtor is filed under subsection (a)(2); except that if—
>
> (i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or
>
> (ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,

> then the term 'filing date' means the date on which such petition was filed or such proceeding commenced."

In terms of the instant proceeding, a receiver was not appointed until January 29, 1971. SIPC contends, however, that this receivership was merely an ancillary action taken pursuant to the injunction proceeding which was commenced on December 22, 1970, eight days prior to the Act's effective date. Although § 5(b)(4)(B)(ii) is rather equivocal, the court is inclined to agree with SIPC that the injunction proceeding commenced on December 22, 1970, determined the filing date by reason of the receiver subsequently appointed. Furthermore, there is another persuasive factor present which compels the same conclusion. The injunction sought by the Commission was based in part upon the failure of Guaranty to meet the net capital requirements of Rule 15c3-1, 17 C.F.R. 240.15c3-1. As previously reflected by the legislative history, the Act was not intended to cover firms in such violation prior to December 30, 1970. This fact, coupled with the inescapable conclusion, drawn from evidence precipitated by the injunction proceeding, that Guaranty was hopelessly insolvent prior to December 30, 1970, persuades the court that to grant the requested relief would be a retroactive application of the Act and a clear frustration of legislative intent. Therefore, the court holds that customers of Guaranty are not entitled to protection under the Act, and it is hereby ORDERED that SIPC be dismissed as a party to this cause.

L. CLURE MORTON
L. Clure Morton
United States District Judge

Order No. 55

IN THE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION

vs.

GUARANTY BOND AND SECURITIES CORPORATION, *et al.*

(Entered February 8, 1973)

The Memorandum filed in this cause on January 10, 1974, dismissing Securities Investor Protection Corporation (hereinafter "SIPC") as a party is amended as follows:

Said Memorandum constitutes the entry of a final judgment as to SIPC in view of the fact that the court specifically finds that there is no just reason for delay for the entry of a judgment as to this defendant. In view of the fact that the Memorandum is serving both as a memorandum and as an order, this amendment constitutes both a determination of the fact that there is no just reason for delay and an express direction for entry of the judgment as provided in Rule 54(b), Federal Rules of Civil Procedure.

/s/ L. CLURE MORTON
United States District Judge

Court of Appeals Opinion

No. 73-1451

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Appellee,

vs.

GUARANTY BOND AND SECURITIES CORP., ET AL.,
Defendants,

JAMES C. BARBOUR, Receiver,
Appellant.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed April 23, 1974.

Before: PHILLIPS, Chief Judge CELEBREZZE and MILLER, Circuit judges.

MILLER, Circuit Judge. Guaranty Bond and Securities Corporation was registered with the S.E.C. as a broker and dealer in securities as required by Section 15(b) of the Securities Exchange Act of 1934. As part of its business, it promoted the sale of church bonds. On December 22, 1970, the S.E.C. filed in the court below a complaint against Guaranty alleging net capital violations contrary to the federal securities laws, including Section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 78*o*(c)(3). Injunctive relief was sought against the alleged violations.

The district court, finding that Guaranty had violated the S.E.C.'s net capital rule and that such violation had existed

for a substantial period of time prior to the filing of the complaint by the S.E.C., granted a preliminary injunction. The court further found that between the filing of the complaint on December 22, 1970 and the granting of the injunction on January 6, 1971, Guaranty had continued to engage in substantial business, handling 101 transactions after the effective date of the Act creating the Security Investor Protection Corporation. On application of S.E.C., a receiver was appointed for Guaranty to take charge of all of its assets subject to the further orders of the court.

On March 31, 1972, the receiver filed a petition for an order directed to the S.E.C. and the Securities Investor Protection Corporation requiring each of them to show cause why S.I.P.C. should not be required to intervene in the action and afford to the customers of Guaranty the benefits of the Act. The show cause order was issued accordingly and both S.E.C. and S.I.P.C. responded. The court, without an evidentiary hearing, filed its memorandum opinion in which it found the Act (S.I.P.A.) was inapplicable to customers of Guaranty for the reason that Guaranty was insolvent and in financial difficulties before the effective date of S.I.P.A. To hold otherwise, it was said, would be to give the Act a forbidden retroactive effect. The court accordingly ordered that S.I.P.A. should be dismissed from the action. This order was certified as a final judgment for purposes of appeal.

The Security Investor Protection Act was enacted in response to the need to protect the customers of securities brokers and dealers which might fail, thereby jeopardizing the cash and securities that customers had left on deposit with the firm[1] S.I.P.A. accordingly created the Securities

1. The legislative history shows the purpose of the S.I.P.A. The serious and persistent financial problems besetting the securities industry in recent months have led to the voluntary

Investor Protection Corporation as a "non-profit corporation," not designed to "be an agency or establishment of the United States Government," but rather to be "a membership corporation,"[2] consistent with the self-regulatory nature of the securities industry. 15 U.S.C. 78 ccc (a). The S.I.P.C.'s role is primarily one of consultation and cooperation with the self-regulatory organizations which remain subject to the federal securities laws and the rules of the S.E.C. By mandating membership in the S.I.P.C. for certain members of the securities industry and by granting the S.I.P.C. general assessment authority over the members in order to establish an S.I.P.C. fund, Congress accomplished its intention that the cost of providing protection to cus-

---

liquidations, mergers, receiverships or, less frequently, bankruptcies of a substantial number of brokerage houses. Such failures may lead to loss of customers' funds and securities with an inevitable weakening of confidence in the U. S. securities markets. Such lessened confidence has an effect on the entire economy. Whatever other steps must be taken to improve these conditions, one objective of the bill, as reported, is to provide investors protection against losses caused by the insolvency of their broker-dealer. The need is similar, in many respects to that which prompted the establishment of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation.

4 U. S. Code Congressional and Administrative News 5255 (1970).

2. The members of S.I.P.C., as defined by 15 U.S.C. Sec. 78 ccc (a) (2), are:

> (A) all persons registered as brokers or dealers under section 78o(b) of this title, and
>
> (B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts;

tomers under S.I.P.C. was to be borne by the securities industry itself.[3]

Under 15 U.S.C. Sec. 78 eee (a)(1), if the S.E.C. or any self-regulatory organization believes that a broker or dealer subject to its regulations in, or approaching, financial difficulty, it must notify immediately the S.I.P.C. If the S.I.P.C. determines that a member broker or dealer has failed or is in danger of failing to meet its obligations to customers, it is authorized to seek a decree in an appropriate court adjudicating that the customers of a member of S.I.P.C. are in need of the protection of the Act. 15 U.S.C. Sec. 78 eee (a)(2). Upon so finding, the district court shall grant the decree and appoint a trustee for the liquidation of the business and an attorney for the trustee. The objectives of the proceeding, in addition to operating the business for a limited purpose, completing the open contractual commitments of the dealer, enforcing rights of subrogation and liquidating the business of the dealer, are "as promptly as possible" (1) to return specifically identifiable property to the customers of a firm, (2) to distribute the "single and separate fund," and (3) to pay to customers monies advanced by S.I.P.C. 15 U.S.C. 78 fff(a). To provide for prompt satisfaction of the net equities of the dealer's customers, S.I.P.C. must advance to the trustee such monies as may be required to satisfy the full claims of each customer not to exceed $50,000. 15 U.S.C. 78 fff(f).

---

3. S.I.P.C.'s first responsibility under the Act was to establish a fund which would consist of all amounts received by S.I.P.C. and from which all expenditures would be paid. 15 U.S.C. Sec. 78 ddd(c). If the fund should become insufficient for the purposes of the Act, the S.E.C. is authorized, if necessary for the protection of the customers of brokers and dealers and for the maintenance of confidence in the United States securities markets, to issue notes under certain conditions to the Secretary of the Treasury in an amount up to one billion dollars, which then may be lent to S.I.P.C. 15 U.S.C. 78 ddd (g).

If S.I.P.C. refuses to act, the S.E.C. is authorized by 15 U.S.C. 78 ggg(b),[4] to apply to the court for an order requiring the S.I.P.C. to discharge its obligations under the Act.

The present appeal involves a unique situation. The appellant, as mentioned earlier, urges, contrary to the district court's decision, that the Act is applicable to Guaranty Bond. The S.E.C. agrees with the appellant's contention that the Act is applicable, but challenges the court's decision that the receiver has standing to petition the court to apply the Act. The S.I.P.C. agrees with the district court as to the inapplicability of the Act but challenges, along with the S.E.C., the receiver-appellant's standing to obtain compliance with the Act.

The S.I.P.A. was effective on December 30, 1970. In two cases, *Lohf* v. *Casey*, 330 F.Supp. 356 (D. Colo. 1971), aff'd. 466 F.2d 618 (10th Cir. 1972) and *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F.Supp. 937 (N.D. Texas 1973), courts have held that S.I.P.A. was not intended to apply to a broker-dealer who had failed prior to that date. The district court in *Lohf, supra* at 358 stated:

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:

4. 15 U.S.C. 78 ggg (b) provides that:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

As mentioned above, this section is hardly couched in terms of exclusivity—a feat easily accomplished had it been the intent of Congress.

> 'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H.R. Rep. No. 1613, 91st Cong., 2nd Sess. 14 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'
>
> This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

Congress seemed to be concerned that S.I.P.C. not be used to compensate customers of members firms of the New York Stock Exchange which "have closed their doors and begun liquidation," when the Exchange had not advanced money from its existing trust fund to protect the customers of those firms. As mentioned earlier in the *Lohf* quote, the Committee Report did use very broad language when it stated that coverage be withheld from firms "either in net capital violation, in liquidation, or in bankruptcy at the time of the creation of S.I.P.C." H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. p. 14 (1970). The meaning of this broad language was subsequently clarified by Representative Moss, sponsor of the Bill, on the floor of the House, when he stated:

> "Finally, we have been concerned all along with the problem of providing protection to the customers of *firms that might fail before enactment of the bill into law.* We early anticipated this possibility but we have specifically declined to make the bill retroactive in its application. The bill is prospective from the date of its enactment." [emphasis supplied] 116 Cong. Rec. 39350-39351, 12-1-70.

Congress, lacking precise information on the condition of the industry, was concerned with the impact that S.I.P.C.

coverage might have on the Treasury. The losses that had already been experienced by the industry were regarded by Congress as the industry's responsibility. S. Rep. No. 1218, 91st Cong. 2d Sess. 6 (1970); H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 14 (1970).

Clearly to apply S.I.P.C. to a firm that was bankrupt prior to the Act would be to give the Act a retroactive application that runs counter to the Act's clear purpose as reflected by its legislative history. However, application of the Act to Guaranty would not be in our view a retroactive application. "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to its enactment." *Cox* v. *Hart*, 260 U.S. 427 (1922). The time period of the financial difficulties of the broker-dealer bears more on the status of the broker within the meaning of the Act than upon the issue of retroactivity.

The court in *Lohf* found the absence of business activity subsequent to the effective date of the Act as determinative of the non-coverage issue when it stated:

> However, it is apparent that plaintiff was not conducting its business as a broker or dealer at the effective date of the Act. The business was in the jurisdiction of the bankruptcy court, and the day to day decisions were being made by the trustee. We cannot consider plaintiff then to be a "broker or dealer," whether registered or not, as contemplated by the Act. It makes no difference for these purposes that plaintiff's registration had not been offically terminated, and thus the automatic membership in the Securities Investor Protection Corporation may have continued in form. It could not be expected that the Act could be applied to firms which had already gone out of business. Plaintiff thus did not have the status of a broker or dealer for the purposes of the Act. 466 F.2d at 620.

The district court in ***Bohart-McCaslin Ventures, Inc.,*** *supra* at 940 made a similar determination when it stated:

> For purposes of determining coverage under the Act, this Court discerns no legal difference between a firm in bankruptcy and a firm in the financial and legal condition which Midwestern suffered prior to the effective date of the Act. Midwestern, prior to the effective date of the Act, had ceased to be a broker-dealer in any real sense of that terms and has not resumed the normal activities of a broker-dealer even at the present time.

These determinations are not applicable to Guaranty since it actually conducted a substantial business after the effective date of the Act. In light of the purposes of the Act, the 101 transactions conducted by Guaranty after the effective date are sufficient, we believe, to qualify Guaranty's customers for the protection provided by the Act. As the Tenth Circuit stated in *Lohf* concerning the coverage of the Act:

> We must take this to mean firms or persons which were actually in business in the usual sense at the critical date were the "brokers or dealers" referred to. Congress was willing to extend coverage to then financially weak institutions and those of unknown strength, but the line was drawn to exclude those which had failed and were thus in fact not brokers or dealers. Supra at 621.

We hold that Guaranty, though financially weak, was, in fact, a broker or dealer at the effective date of the Act.

The court below focused on the filing date of the action against Guaranty by the S.E.C. which was prior to the effective date of the Act. However, the S.E.C. did not

seek to force Guaranty into receivership until after the effective date. Therefore, the filing of the original S.E.C. action did not prevent Guaranty from conducting normal business after the effective date of the Act and thus qualifying as a broker-dealer.

The S.I.P.C. and the S.E.C. challenge the receiver's standing to bring an action to compel either of them to act under the S.I.P.A. The court below held that the provisions of the Act "do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of S.I.P.C." We agree. The appellees point to an absence of express language providing for an enforcement action by the customers of a securities company or their representatives as prohibiting such an action. We are persuaded, however, that the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C.,[5] evidences an intent by Congress that the statute should not be as narrowly construed as the appellees urge.

The customers of Guaranty have a definite interest in the application of the S.I.P.A. to the present litigation. The receiver, the representative of the customers of Guaranty, seeks to have the S.I.P.C. meet its obligations to the customers under the broad purposes of the S.I.P.A. Apparently, the S.I.P.C. has not attempted to obtain an adjudication of the necessity for providing the protections of the S.I.P.A. to the customers of Guaranty. Nor has the S.E.C. moved to compel the S.I.P.C. to meet its obligations. We do not believe that Congress intended under such circum-

5. 15 U.S.C. 78 ccc (b) (1) provides that the S.I.P.C. has the power "to sue and be sued, complain and defend, in its corporate name, through its own counsel, in any court, State or Federal."

stances to leave the customers of securities firms without remedy under the S.I.P.A. Furthermore, despite the appellees urgings, we find no constitutional[6] or statutory prohibition[7] to the maintenance of an enforcement action by the receiver in this case.[8]

The judgment of the district court holding the S.I.P.A. inapplicable and dismissing the action as to S.I.P.C. must therefore be reversed for the reasons stated herein. Since we reject the premise on which the S.I.P.C. was dismissed as a party to the action—inapplicability of the S.I.P.A. to a company of Guaranty's status—the action is remanded to the district court for processing consistent with this opinion and specifically to determine and enforce any rights of Guaranty's customers under the S.I.P.A.

---

6. To meet the "case or controversy" requirement of the Constitution, the Supreme Court has formulated a standard for ascertaining those persons with "standing" for maintaining an action in a federal court. The standard as defined by the Supreme Court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1971), is that one must have suffered "injury in fact" and the injury must be an "interest arguably within the zone of interests to be protected." The customers of Guaranty and their representative clearly meet this broad standard. *See also Data Processing Service* v. *Camp*, 397 U.S. 150.

7. As mentioned earlier, there are no terms of exclusivity of enforcement in the statute.

8. The S.I.P.C. also attacks the jurisdiction—both subject matter and in personam—of the district court to entertain this action. We find that the district court sufficiently disposed of these contentions in its memorandum opinion.

FILED
APRIL 23, 1974
JAMES A. HIGGENS, *Clerk*

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1451

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

GUARANTY BOND AND SECURITIES CORPORATION, ET. AL.,
Defendants,

JAMES C. BARBOUR, RECEIVER,
Appellant.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings.

It is further ordered that Appellant recover from Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN

Clerk

A True Copy.

Attest:

John P. Hehman, Clerk

Issued as **Mandate:**

COSTS To be recovered by Appellant

Filing fee	$25.00
Printing	$ —
Total	$25.00

SUPREME COURT OF THE UNITED STATES

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, *et al.*

ORDER ALLOWING CERTIORARI. Filed October 21, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to the following questions:

"1. Whether customers of a Member have an implied private right to action to compel SIPC to meet its alleged obligations to them under the Act, despite Section 7(b) thereof which grants that right only to the Securities and Exchange Commission?

"2. If such a right of action can be implied, whether a receiver of a Member has standing to maintain it?"